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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 36

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Petitioner*

v.

VICE ADMIRAL HYMAN G. RICKOVER, *Respondent*

No. 55

VICE ADMIRAL HYMAN G. RICKOVER, *Petitioner*

v.

PUBLIC AFFAIRS ASSOCIATES, INC., Trading as
PUBLIC AFFAIRS PRESS, *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PUBLIC AFFAIRS ASSOCIATES, INC.

(Petitioner in No. 36 and Respondent in No. 55)

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OPINION BELOW

The opinion of the court of appeals (R. 47) is reported at 284 F.2d 262.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1960 (R.65), and was modified on January 17, 1961 to provide that each party bear its own costs on appeal.[1]

The petition for a writ of certiorari was filed on January 14, 1961, and the cross-petition for a writ of certiorari filed on February 17, 1961. Both petitions were granted on March 20, 1961, and the cases consolidated 365 U.S. 841 (R.67). The jurisdiction of the Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where a high-ranking and policy-forming Federal official makes public statements or speeches directly related to or connected with his official duties (which are delivered while he is on official duty and are multilithed by Government personnel on Government facilities and on Government time), are copies of such public statements or speeches "Government publication[s]" under the Printing Law or "publication[s] of the United States Government" under the Copyright Law, and therefore not subject to copyright, under the following circumstances:

a) If they are issued and publicized by his employing Government agencies as official Government press releases on official Government letterhead, and distributed through official Government channels by Government personnel, without any disclaimer whatsoever (either by the official or the Government) of their official character?

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[1] Conditional Cross Petition for a Writ of Certiorari, No. 739, Oct. Term 1960, p. 17.

b) If they are issued as press releases without Government imprimatur?

2. Does Freedom of Press, under the First Amendment, protect the press and the American public from arbitrary limitation of access to such public statements or speeches through private copyright monopoly over press releases of such statements or speeches?

3. Are such public statements or speeches dedicated to the public domain if, prior to copyright, multilithed copies are widely distributed to the press, to individuals upon request and unsolicited to other individuals, to the public sponsor of the occasion at which the speech is delivered in large batches "to be made available to the press and others", and in other public places unrelated to the location or sponsorship of the speech, with no indication whatsoever of limitation or restriction upon the use of such press releases?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Copyright Law, 17 U.S.C. 8, provides: "No copyright shall subsist in the original text of any work which is in the public domain, . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof: . . ." This provision of law dates from 1909, 35 Stat. 1075, §7.

2. The Printing Law, 44 U.S.C. 58, provides in part that ". . . No publication reprinted from such stereotype or electrotype plates ['from which any Government publication is printed'] and no other Government publication shall be copyrighted." This provision of law dates from 1895, 28 Stat. 608, §52.

3. The First Amendment to the Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The facts are as follows:

1. Petitioner [2] is an educational publisher, located in Washington, D. C.; it specializes in pamphlets and books on national affairs.

2. Respondent is a Vice Admiral, one of the 26 top officials in the entire United States Navy. During the pertinent period he was on active duty in the Navy Department as Assistant Chief of the Bureau of Ships for Nuclear Propulsion and also served simultaneously as Assistant Director for Naval Reactors, Division of Reactor Development, U.S. Atomic Energy Commission (R.6). He has had a major role in achievement of America's first atomic submarine, the *Nautilus*, as well as the nation's first commercial atomic power plant at Shippingport, Pennsylvania.

3. Between October 20, 1955 and January 15, 1959, the date of commencement of this action, Respondent publicly delivered 23 speeches (R.6) on matters connected with or directly related to his official duties. The titles of these speeches appear at R.105; some of them are as follows:

"Metallurgy in Atomic Power"
"Nuclear Power and the Navy"
"Lead Time and Military Strength"
"Nuclear Power—Challenge to Industry"
"The Challenge of Nuclear Power"
"The Naval Revolution"
"The Meaning of the Nautilus' Polar Voyage"

Subsequent speeches included "The Shippingport Atomic Power Station: Lessons From Its Operation."

(a) The texts of the first 22 of Respondent's speeches were officially published by the United States Government (R.10); 13 of them were formally issued by the U.S. Department of Defense as official Government press releases on Defense De-

[2] The terms "Petitioner" and "Respondent" will be used in this brief to designate the parties in No. 36, except when otherwise stated.

partment letterheads (*e.g.*, R.70, and p. 49 of Petition for Writ of Certiorari), and others were officially issued by the Atomic Energy Commission on A.E.C. letterheads (*e.g.*, R.69, and p. 50 of Petition).

(b) Each such Government press release described Respondent in his official capacity, generally with all of his official titles.

(c) Such official press releases of Respondent's speeches carried official notice of a specified official telephone number where Government information officers were to be available to discuss and provide further official information on Respondent's speeches and their contents (*e.g.*, R.69, 74, 79, 81, 84, 89).

(d) At the time of the issuance and distribution of the first 22 press releases, none among the first 22 speeches contained any copyright notice and no written or oral restriction of any kind whatsoever was placed upon their use or upon their publication, in whole or in part, nor was there any indication of any kind whatsoever that they were not the official documents which on their face they purported to be or that they were not to be construed as official.

(e) Respondent made no application for copyright registration on any of these first 22 speeches until December 1, 1958, *after* all of them had been delivered and the official press release on each of them had been publicly distributed (except for Numbers 7 and 12) by the issuing Government agency (R.7). When furnished to the Copyright Office copies of these 22 speeches were identical with the original official press releases in all respects but one: they did not reveal their original Government *imprimatur* as described above. Respondent did not disclose to the Copyright Office the fact that these first 22 speeches had originally been issued and circulated to the public as official Government press releases.[3]

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[3] As an example of Respondent's practice of non-disclosure, compare the form of Speech No. 8, "The Challenge of Nuclear Power", issued as an official Defense Department press release at the time of delivery (R.74) with the form of the very same speech concealing this fact, as

(f) The 23rd speech bore a copyright notice prior to distribution. Respondent's copyright registration showed that the document was prepared by a person admitted to be Respondent's official Government secretary (R.7, 25).

4. The speeches were distributed, except for Numbers 7 and 12 (R.8), in the following manner:

(a) Multilithed or processed copies of the first 22 speeches were officially distributed by the Public Information Offices of the Department of Defense or of the Atomic Energy Commission, through official Government press channels, as official Government press releases (R.8, 14);

(b) All the press releases were, in addition, distributed by the Respondent:

i.) Approximately 50 copies were furnished to the sponsor of each speech "to be made available to the press *and others* at the place where the speech was to be delivered" (R.8, emphasis added);

ii.) Mailed "to individuals who had requested copies or who [sic] Admiral Rickover believed would be interested in the subject" (R.8); and

iii.) At the National Press Club in Washington, D. C., for the use of the press or such other persons as there sought or found them, although none of the speeches was delivered at that location (R.8).

5. The original draft of each speech was prepared by Respondent, and the final draft typed by Respondent's Government secretary in his Government office. All of the first 22 speeches were multilithed by Government employees during their regular office hours, using Government duplicating machines and on Government press release letterheads (R.8, 25, 48).

6. The General Regulations of the United States Navy, Article 1252 ¶3, require that all non-official publications by all persons in the Naval Service shall bear "a statement to the effect that the opinions or assertions contained therein are the

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submitted for copyright registration (R.77). For a photocopy of actual original press releases, see Petition for Writ of Certiorari, No. 649, Oct. Term 1960, pp. 49-50.

private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large" (R.103).

7. Respondent admits that he did not make such disclaimer in any of the 23 speeches (R.10). The Trial Court found that "some of them dealt with ideas that the Admiral developed in connection with his activities as a Naval officer", 177 F.Supp. 601, 602.

8. Department of Defense Directive No. 5230.9 provides for the "official release" through "press release" of "defense information originated by the Department of Defense" (§IV). This Directive does not authorize issuance of official Government press release of writings prepared by Defense Department officials in their private capacity (§V) (R.101-102).

9. On or about October 29, 1958, the Petitioner asked Respondent for copies of two of these speeches in order to quote from them. Thereafter, but prior to December 1, 1958, Respondent adjured the Petitioner not to quote from such speeches (R.6).

10. At all times when Respondent delivered the speeches herein involved, he was on official duty and had not taken leave of any kind for personal purposes, either for traveling to the location of the speech or for the time during which the speech was delivered. In every case Respondent's travel to the location of the speech was paid for by the United States Government as official travel (R.9).

11. When honoraria were offered to Respondent for some of the speeches, he requested that they be paid to a specific charity. In no case did he accept for himself payment for his speeches (R.9).

12. No question is involved of secrecy or control of information for reasons of national security or because of executive privilege.

SUMMARY OF ARGUMENT

This case involves an attempt by a Vice Admiral of the United States Navy to copyright copies of 23 speeches delivered

publicly while on official duty, on subjects connected with or directly related to his official duty. Twenty-two of these speeches were issued as official Government press releases, either by the Department of Defense or the Atomic Energy Commission, and widely and generally distributed to the press and others with no indication of any nature whatsoever disclaiming official character or limiting the use of such official press releases. The official Government press releases of these speeches were in all respects like other Government press releases: they purported to be official Government documents making public matters which were of official concern to the issuing Government agency. Of the 23 speeches, the first 22 bore no copyright notice at the time of their original issuance and distribution as official Government press releases.

The Printing Law and the Copyright Law both forbid copyright of any "Government publication". The question before this Court is whether the press releases of the speeches in question, made by a high-level, policy-forming Government official while on official duty concerning Government affairs entrusted to him within the scope of his official duties, were "Government publications" which may not be copyrighted, whether or not they were issued as official Government press releases. The Trial Court held that 1) copies of these press releases were not "Government publications", and 2) their issuance and distribution under the circumstances described was not a general publication committing them to the public domain. The Court of Appeals affirmed on the first point but reversed on the second. This Court granted Petitions raising both points for review.

Petitioner respectfully submits that, on the facts of the instant case, the 22 speeches that were issued as official Government press releases are "Government publications" which could not validly be copyrighted, and that the 23rd speech is likewise a "Government publication" because it, like the others, was prepared by a Government official in the course of his official duty.

Statutory Argument

No "Government publication" nor "any publication of the

United States Government" may validly be copyrighted under the Printing Law and the Copyright Law. However, those laws do not define the quoted terms. Therefore, the resolution of the question before the Court depends upon judicial construction of the statutes.

I

Under generally applicable rules of statutory construction, undefined terms are to be read in their "ordinary", "usual" and "normal or customary meaning", as they would appear to "the ordinary man". On the facts of this case, the only "sensible construction" of the terms "Government publication" and "any publication of the United States Government" is that a publication prepared by a Government official which looks like, purports to be, has all the indicia of, and is treated like a "Government publication", and is officially published, issued and distributed by a Government agency as an official Government press release, comes within the meaning of the statutory terms "Government publication" and "publication of the United States Government". Such interpretation that an official Government press release is a "Government publication", has long been accepted by the Superintendent of Documents in his *Monthly Catalog of United States Government Publications*, by the Library of Congress' Division of Documents, by the American Library Association and by experts on Government publications.

II

A publication prepared by a Government official is a "Government publication" when its subject matter comes within the scope of his official duties:

1. Courts of appeal have held under the very copyright statutes here involved that a publication is a "Government publication" when it is prepared by a Government official "in connection with", "as a result of", and "relating to" his official duties.

2. This Court has held in several cases that the proper legal rule for determining if a Federal official acted within the scope

of his official duties is whether the questioned action has "more or less connection with the general matters committed by law to his control or supervision", *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). This Court has specifically rejected the rule of law adopted by the court below that the specific action in question must be "*required* by law or by direction of his superiors". *Barr v. Matteo*, 360 U.S. 564, 575 (1959). The proper test of official duty is the *relation* of the employee's acts to his official duties.

III

The subject matter of Respondent's speeches comes clearly within the scope of his official duties:

1. Ten of Respondent's 23 speeches deal primarily with nuclear energy and naval warfare. His major themes in these 10 speeches are nuclear energy, the industrial aspects of naval vessel construction, and the revolution in sea warfare caused by atomic-powered vessels. These 10 speeches are patently within the scope of Respondent's official duties, bearing in mind his two major official project responsibilities: development of the nuclear submarine (the NAUTILUS, the world's first nuclear submarine), and construction of the first large-scale nuclear power reactor devoted exclusively to producing electricity (the Shippingport Atomic Power Station).

2. Ten other speeches deal with the relation of national defense to education. The speeches themselves, as well as the public record, reveal that for many years, both before, during and after the period here involved, Respondent's official duties directly involved educational matters: appraisal of the effectiveness of existing schools in providing persons competent to do the job assigned to Respondent and his staff, and organization and operation of formal school systems within his employing Government agencies in order better to carry out his official responsibilities.

The Respondent

a) created and operated his own special schools within the Navy, for the education and training of every person assigned to his staff,

b) was instrumental in setting up a similar specialized school for the Atomic Energy Commission, another of his Government employers, and

c) was likewise instrumental in organizing a nuclear engineering school in a leading private university. As the Respondent himself said in one of these speeches: "I have been running schools for years." The educational subjects discussed in these 10 speeches were connected with and directly related to his official duties.

3. The remaining 3 speeches were delivered on the occasion of his acceptance of awards recognizing his outstanding contributions in the fields of his official duties, one such award being accepted by him "on behalf of the Government and the Congress of the United States."

Constitutional Argument

Petitioner publisher's Freedom of Press, protected by the First Amendment, was abridged by the United States Government's registering, and the Respondent's receiving, a copyright monopoly over Respondent Government official's speeches, publicly delivered while on official duty on subjects connected with or directly related to his official duties.

I

Freedom of Press was incorporated in the Bill of Rights as a means of protecting the American people's *right to know*. The Constitution chose the press as the instrumentality to provide a free people with the information necessary to control its government. Freedom of Press was not designed to provide special status for the publishing business but rather to protect the personal right of each American, the press being only a trustee of that right. For this reason, Freedom of Press is constitutionally protected for all publishers, not merely for some.

II

Freedom of access to official Government materials is an indispensable constituent part of Freedom of Press, at least where—as here—no issue of security or executive privilege prevails. Constitutionally-protected Freedom of Press includes not only the publisher's right to print and the distributor's right to circulate, but also the American people's right to read (as a means of achieving its right to know). Freedom of Press must, at the very least, include *freedom of access* to materials officially and publicly released by the Government.

Therefore, Petitioner's constitutional right of Freedom of Press is abridged by a private copyright over publicly-made and officially-released speeches delivered by a Government official while on government duty on matters connected with and directly related to his official duty.

III

The decision below abridges Petitioner's Freedom of Press and sanctions suppression of publicly-released Government information for private purposes. The United States Government failed to prevent its employee from improperly copyrighting "Government publications", and it improperly issued copyright registration to the Respondent for such speeches.

IV

The Constitution is a living and sensitive document that constantly adjusts to "the new circumstances and situations" facing the American people. *Hurtado v. California*, 110 U.S. 516, 530 (1884). The First Amendment protects not only the freedom to print and disseminate information but also the freedom to acquire it. *At the very least, Freedom of Press gives constitutional protection for free access to all officially-released Government publications prepared by Government officials in the course of their official duties.*

Public Domain Argument—
Reply to Respondent's Main Brief in No. 55

The admitted distribution of substantial numbers of multilithed copies of Respondent's speeches, distributed by himself and by the Department of Defense and the Atomic Energy Commission, without any restriction whatsoever as to persons who could receive such copies or the use they could make of them, constituted a general publication which dedicated the speeches to the public domain. The Court below correctly ruled, "That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, 'All claims to copyright waived'," 284 F. 2d at 271 (R.60).

I

The issue before the Court is not whether oral delivery of a speech constitutes publication but rather whether widespread, unrestricted and unlimited distribution of physical copies of the speeches constitutes general publication.

II

The undisputed facts show widespread, unrestricted and unlimited distribution to any and all who sought copies, to others unsolicited by them, and by widespread official press release, and by placement in general public places where they were available to any passer-by. There was no copyright notice at the time of such distribution, and neither written nor oral limitation upon their use or publication or upon their distribution or availability.

III

A general publication occurs when distribution of material is unrestricted *either* as to person or use. If it is distributed without limitation *either* as to persons who may obtain it or as to use which may be made of it, a general publication results.

In this case, there was no restriction whatsoever as to the

nature or number of persons to whom copies could and did go, nor any limitation as to the use anyone could make of the copies. In addition, copies were made openly available at a public place for unrestricted distribution. In short, the facts clearly show that in this case copies of the Respondent's speeches were made available to the public and that a general publication took place.

Petitioner respectfully submits that the decision and judgment of the court below should be

1) *Reversed* in No. 36 insofar as it held that copies of the speeches in question were not "Government publications" and that therefore they were legally subject to valid copyright, and

2) *Affirmed* in No. 55, if it be necessary to reach this issue at all in view of the first holding, insofar as the court below held that the distribution of the speeches was a general publication which dedicated them to the public domain.

ARGUMENT

The question before the Court is the propriety of the private copyrightability of press releases containing speeches delivered by a high-level, policy-forming Government official while on official duty on subjects falling within the scope of his official duty.

Two major legal-policy pressures are at play here: the desirability of encouraging public officials to speak out publicly on matters of public interest; and the protection of the American people's *right to know* what their Government and their Government officials do and say.

Petitioner believes that it is of utmost importance to encourage public officials in speaking or writing what may be in their minds and hearts. But that is not the issue before the Court here. What is here is the proper scope of legal protection to be afforded to public property, in this instance "Government publications". The question in the instant case is the protection of the public character of official statements by Government officials made within the scope of their official duty.

The court below held that the press releases of Respondent's speeches were not "Government publications" and were, there-

fore, susceptible of private copyright. Petitioner respectfully submits that this decision was erroneous and presents two principal arguments in support of its position that the decision of the court below should be reversed on this holding. The first argument is that under the applicable statutes and decisions, as applied to the facts of this case, Respondent's speeches were "Government publications" and, therefore, were subject to the statutory restriction against the copyrighting of "Government publications". The second argument is that under the facts of the instant case, Petitioner's constitutionally-protected Freedom of Press, under the First Amendment, is abridged by Respondent's Governmentally-registered copyright monopoly over access, by the press or the American people, to public statements which he made as a high-level Federal official while on official duty and within the scope of his official duties.

STATUTORY ARGUMENT—The printing and copyright laws forbid copyright of speeches (1) which are issued as official Government press releases or (2) are made within the scope of official governmental duty.

Under the applicable statutes, the ultimate legal issue before the Court in this case is whether Respondent's 23 speeches were legally copyrightable. The dispositive statutory question is whether a copy of each speech was a "Government publication" under the Printing Law, 44 U.S.C. 58, or "any publication of the United States Government" within the meaning of the Copyright Law, 17 U.S.C. 8. If the question is answered in the affirmative, then the speeches were not legally subject to valid copyright.

Neither applicable statute defines the operative terms "Government publication" or "publication of the United States Government". However, in the context of this case, each such term is capable of valid definition on the following two principles:

1. Under generally applicable rules of statutory construction, an official Government press release is a "Government

publication".[4]

2. A publication prepared by a Government official on subjects connected with or directly related to his official duties is a "Government publication" within the meaning of the operative statutes.

At the outset, it should be noted that a Government publication can appear in mimeographed or other processed form and need not be printed,[5] and can be issued by any Government agency and need not emanate from the Government Printing Office.[6]

I. An official Government press release is a "Government publication" and is not copyrightable.

When faced with the problem of statutory construction of an undefined word, this Court has ruled that ". . . Congress will be presumed to have used a word in its usual and well-settled

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[4] The term "Government publication" will be used herein to cover both "Government publication" (Printing Law, 44 U.S.C. 58) and "any publication of the United States Government" (Copyright Law, 17 U.S.C. 8), except where otherwise indicated.

[5] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, April 1940, p. iv; June 1961, p. vi.; SCHMECKEBIER & EASTIN, GOVERNMENT PUBLICATIONS AND THEIR USE 421-23 (Rev. ed. 1961); MERRITT, THE UNITED STATES GOVERNMENT AS PUBLISHER 3-4, 31 (1943); Tisdel, *Processed material and depository libraries*, in AMERICAN LIBRARY ASSOCIATION, PUBLIC DOCUMENTS 38 (1936).

[6] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, June 1961, vi ("The individual issuing department, bureau, office or agency is considered the publisher of Government publications.") A former Assistant Register of Copyrights wrote: "Nice questions may arise as to whether or not a given work is a 'publication of the United States Government' within the meaning of §7 [now, 17 U.S.C. 8]. No case defining these terms comprehensively is found, but they undoubtedly embrace all official documents published at Government expense, as well as the interminable registers, bulletins and circulars of information issued by the various bureaus, agencies, and projects maintained by the Government". HOWELL, THE COPYRIGHT LAW 45 (1952).

sense",[7] in its "commonly accepted import",[8] in its "ordinary", or "usual"[9] usage, its "normal or customary meaning"[10] or in its "popular" import.[11]

For a unanimous Court, Mr. Justice Frankfurter wrote:

> "'Officers' is a word of familiar usage, and '[a]fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.' Addison v. Holly Hill Products Co., 322 U.S. 607, 618 . . ."[12]

Mr. Justice Holmes once said that "there is no canon against using common sense in construing laws as saying what they obviously mean."[13] Elsewhere this Court has sought a "sensible construction" of an undefined statutory term.[14]

"The ordinary man" can accept no other "sensible" meaning than that where a publication

—*looks* like a Government publication

—*purports* to be a Government publication

—is *published* under Government imprimatur

[7] United States v. Stewart, 311 U.S. 60, 63 (1940).

[8] United States v. Wurts, 303 U.S. 414, 417 (1938); III SUTHERLAND, STATUTORY CONSTRUCTION 429-37 (3rd ed. Horack) ("words in a statute are to be given their common meaning").

[9] Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1948); Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 506 (1945); Rosenman v. United States, 323 U.S. 658, 661 (1945); Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922); Danciger v. Cooley, 248 U.S. 319, 326 (1919); United States v. Lombardo, 241 U.S. 73, 76 (1916); Columbia Water Power Co. v. Col. Elec. Street R.L.&P. Co., 172 U.S. 475 (1899).

[10] Old Colony Trust Co. v. Commissioner, 301 U.S. 379, 383 (1937); Avery v. Commissioner, 292 U.S. 210, 214 (1934); De Ganay v. Lederer, 250 U.S. 376, 381 (1919); Caminetti v. United States, 242 U.S. 470, 489 (1917).

[11] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 312 (1956); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951).

[12] Deputy v. DuPont, 308 U.S. 488, 493 (1940).

[13] N.L.R.B. v. Coca-Cola Bottling Co., 350 U.S. 264, 268-69 (1956). *Cf*: Frankfurter, *Some Reflections on the Reading of Statutes*, 46 COL. L. REV. 527, 536 (1947).

—is *issued* and *distributed* by Government agencies

—*comprises* a Government official's speech

—has all the *indicia* of a Government publication, and is

—*treated* by the Government and all who receive it as a Government publication,

it is *in fact* a Government publication.

Just such a sensible construction, that an official Government press release is a "Government publication", has been adopted by the United States Superintendent of Documents (who is charged by law with the duty of issuing a monthly Catalog of United States Government Publications),[16] by the Library of Congress' Division of Documents,[17] by the American Library Association,[18] by leading scholars in the field of Government publications,[19] and apparently also by the Department of Defense itself.[20] Perhaps this Court has already recognized this interpretation, if somewhat tangentially.[21]

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[14] Roschen v. Ward, 279 U.S. 337, 339 (1929).

[15] United States v. Ryan, 284 U.S. 167, 175 (1931). *Cf.* United States v. Shirey, 359 U.S. 255, 261 (1959) ("statutory meaning . . . is more often to be felt than documented").

[16] U. S. Superintendent of Documents, UNITED STATES GOVERNMENT PUBLICATIONS MONTHLY CATALOG, Jan. 1936, p. 3.

[17] CHILDS, GOVERNMENT DOCUMENT BIBLIOGRAPHY (Library of Congress, Division of Documents), p. vii (3rd ed. 1942).

[18] AMERICAN LIBRARY ASSOCIATION, PUBLIC DOCUMENTS AND WORLD WAR II, p. 8 (1942, ed. Wilcox).

[19] SCHMECKEBIER & EASTIN, supra n. 5, at 423; MCCAMY, GOVERNMENT PUBLICATIONS FOR THE CITIZEN 67 (1949); BOYD, UNITED STATES GOVERNMENT PUBLICATIONS 18 (3rd ed. rev. 1949). *Cf.* Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 231 et. seq. (1957).

[20] Dept. of Defense Directive No. 5230.9 ¶¶IV-V, R.101-2. See ¶8 Statement of Case, *supra*, p. 6. See also U. S. Navy PUBLIC INFORMATION MANUAL, Article 0501(4) ("For purposes of Navy Information, a release is defined as any material, written, printed, photographic, or oral, which is disseminated to the public by the Navy through any media.") *Cf.* the Comptroller General's ruling that an article which bore the legend

Petitioner respectfully submits that the only sensible interpretation of the statutory term "Government publication", the only ordinary, usual, normal or customarily accepted meaning that can be given to such words of familiar usage as "Government publication" is that they include the official Government press releases involved in the instant case. It is therefore respectfully urged that the relevant rules of statutory construction stated by this Court, as applied to the undisputed facts of this case, require reversal of the decision of the court below on at least the first 22 speeches which, having been issued as official Government press releases, were "Government publications" within the Printing and Copyright Laws and therefore were not legally subject to copyright.

II. A publication prepared by a Government official on subjects directly related to or connected with his official duties is a "Government publication" which cannot legally be copyrighted.

Petitioner has sought thus far to establish that Respondent's first 22 speeches were "Government publications" by virtue of their having been issued as official Government press releases under the circumstances described.

However, speech No. 23—although issued as a press release (R.8, 38)—was not officially issued as a Government press release, and Numbers 7 and 12 were not released at all. Therefore, it becomes necessary to ascertain the appropriate rule of law for determining when a publication prepared by a Government official is a "Government publication".[22] Petitioner respect-

"Contribution from the Fixed Nitrogen Research Laboratory" became thereby an official, not a private, publication. 7 Comp. Gen. 221 (1927).

[21] In Barr v. Matteo, 360 U.S. 564, 574 (1959), Mr. Justice Harlan said: "The issuance of press releases was standard agency practice, as it has become with many governmental agencies in these times." *Cf.* Mr. Justice Frankfurter's comment from the Bench that "the public relations counsel is part of our American way of life", 29 U.S.L. WEEK 3136 (Dec. 19, 1960).

[22] Notwithstanding his copyright registration, Respondent did *not*

fully submits that the court below adopted an erroneous rule of law, and that the correct rule of law would (in the light of the facts as analyzed in Part III below) demonstrate not only that speech No. 23 is a "Government publication" but would also give independent verification of that some conclusion as to the previous 22 speeches.

According to the court below, to qualify as "Government publication", a work must be "commissioned or printed at the cost and direction of the United States", 284 F.2d at 268, and the material must be "called for by his official duties", 284 F.2d at p. 269. This ruling is unique. All other appellate courts have held that a publication is a "Government publication", and a Government employee's act is within the scope of "official duty", when it is connected with or directly related to a Government employee's official duties.

1. *The copyright cases hold that a publication prepared by a Government official "in connection with" or having "relation to" his official duties is a "Government publication".*

All the leading appellate copyright decisions have applied the rule of law that a publication prepared by a Government official in connection with or directly related to his official duties is a "Government publication". *Sawyer v. Crowell Publishing Co.*[23] dealt with a map of Alaska produced by a Government employee. The District Court stated the following rule of law: ". . . when an employee creates something *in connection with* his duties under his employment, the thing created is the property of the employer . . ." [24]

The District Court analysed the degree of connection under the facts of that case and found that "this relates directly to the subject matter of the Government employee's work", and that

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disclaim any official character or status for the 23rd speech (R.10), as he was required by Navy Regulations to do whenever a speech was to express private views. (Navy Gen. Regulations §1252 ¶3, R.104).

[23] 46 F. Supp. 471 (S.D.N.Y. 1942), aff'd 142 F. 2d 497 (2d Cir. 1944), *cert. denied* 323 U.S. 735 (1944).

[24] 46 F. Supp. at 473 (*emphasis added*).

"The map was prepared as a *result of and relating to* the plaintiff's work in Alask. in the course of his official duties." [25] The Court of Appeals, in affirming the Trial Judge's decision, specifically sustained this doctrine of law.

Another case involving the very same basic issue, *United States v. First Trust Co. of St. Paul*, dealt with Clark's original rough notes for the formal diary of the Lewis and Clark Expedition. The United States claimed that the notes were made in the course of Clark's official duty. The District Court ruled otherwise: "These notes had *no relation to* the affairs of the [Indian] Agency. They were not made *in connection with Clark's conduct of the* [Indian] Agency." [26] And here the Court of Appeals also specifically affirmed the validity of this legal doctrine.[27]

Thus the court below is a minority of one in adopting the view that a publication prepared by a Government official is not a "Government publication" unless it is specifically "called for by his official duties." [28] The court below did not even deem it necessary to distinguish between those speeches which were and those which were not related to or connected with Respondent's official duties,[29] since it specifically rejected degree of connection (between the publication and the Government officer's official duty) as the relevant legal test.[30]

It is universally recognized, as this Court has stated, that ". . . the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails",

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[25] Finding of Fact cited by Court of Appeals, 142 F.2d at 493 (*emphasis added*).

[26] First Trust Co. of St. Paul v. Minn. Historical Society, 146 F. Supp. 652, 653 (D. C. Minn. 1956) (emphasis added).

[27] *Aff'd sub nom.* U.S. v. First Trust Co. of St. Paul, 251 F. 2d 686, 691 (8th Cir. 1958).

[28] 284 F. 2d at 269. See Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, 1960 WASH. U.L.Q. 182.

[29] Gunnels, *op. cit. supra* at 187.

[30] 284 F. 2d at 269 ("It cannot be properly said, as appellant asserted, that a government official who speaks or writes of matters with which he is concerned as an official is by the very fact of being an official barred from copyright on his productions.")

and that broader interpretation must be given to the scope of duties of a "policy-making executive official", *Barr v. Matteo*, 360 U.S. 564, 573, 575 (1959). Thus, the higher the official's status the more unlikely that there will be anything specifically "called for by his official duties", as the rule adopted below requires.

It will be seen, therefore, that unfortunate results develop from the rule adopted below. A person in subordinate position, whose official duties are strictly delineated in terms of expressly designated tasks, is not able to copyright a publication he produced. On the other hand, his superior, in a more responsible and remunerative position, whose high-ranking and policy-forming status normally required his duties to be stated in more general terms, involving the exercise of discretion and initiative, and who by the nature of the circumstances determined his own duties as he went along [31] would be permitted to procure private copyright for precisely the same publication. Fortunately this incongruous result is totally unnecessary under the copyright statute. The rule of the other Courts of Appeals and here urged upon this Court, produces a fair and sensible result, fully consistent with Congressional purpose and public interest, that any employee (whether high or low) whose official duties are related to or connected with a resulting publication is barred from copyright of such publication on the ground that the connection with official duty makes it a "Government publication".

The Navy Department itself has stated that the duties of command officers, whatever else they may involve, also include keeping "the public informed of the activities of the Navy". The *U.S. Navy Public Information Manual* (1953, reprinted 1957) states:

"The First Amendment to the Constitution of the United

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[31] See Respondent's own statement about his responsibilities. "I do not know which hat I am wearing. I understand that I have some job descriptions in the Navy and the AEC, but I have been too busy to read the job descriptions. I only know that I am responsible and that is enough", *Hearings Before Joint Comm. on Atomic Energy*, June 15, 1961, typed transcript, at 213.

States provides for the freedom of speech and of the press . . ." [Article 0507(1)]

"The public has the right to know the manner in which laws are enacted and administered. As an agency of the Federal government, the manner in which the Navy is administered is considered to be within the public domain . . ." [Article 0518(1)]

". . . it is a policy of the Navy and a function of command 'TO KEEP THE PUBLIC INFORMED OF THE ACTIVITIES OF THE NAVY AS COMPATIBLE WITH MILITARY SECURITY'." [Article 0601(1)]

The effect of such official statement of command duties was thus recognized recently: "Similarly, in *Rickover* the Admiral's speeches might well have been considered within the scope of his official duties as a report of a Government officer to interest segments of the public for the execution of his program, or even as carrying out the public relations aspect of his job." [32]

2. *The scope of a Government officer's official duty depends on the relationship or connection between his action and his official duties.*

Whether a publication prepared by a Federal official is a "Government publication" depends on whether its production was within the scope of his official duties. The Register of Copyrights, in a report to the Congress, stated that his office had adopted the following rule [which is consonant with the decisions above quoted]: "Any work produced by a Government employee within the scope of his employment is not copyrightable, even though issued by a private publisher." [33]

This Court has had many occasions, apart from copyright cases, to determine whether and when a Federal official has acted

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[32] Comments, *Copyrights—Right of the Federal Government and Its Employees*, 6 VILL. L. REV. 531, 542 (Summer 1961).

[33] Register of Copyrights, COPYRIGHT LAW REVISION, *A Report on the General Revision of the U. S. Copyright Law*, House Comm. Print, House Comm. on the Judiciary, 87th Cong., 1st Sess., July 1961, p. 131 (hereinafter cited as *Report of Register of Copyrights*).

within the scope of his official duty. The issue arises, for example, when a Federal officer or employee makes a statement, writes a letter, or issues a press release which might be actionably libelous to another party. The typical ruling in such cases is that if the statement is made by a Federal officer in the course of his official duty, he is immune from the otherwise applicable liability for defamation. Thus, the basic legal question in that line of cases is: When is the Government officer or employee acting in his official capacity and within the scope of his official duties? The underlying legal issue in the instant case is identical with the underlying legal issue in the Government libel cases.

In the leading case, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), Mr. Justice Harlan said that the test of official duty was whether it involved "action having more or less connection with the general matters committed by law to his control or supervision".

This Court's latest relevant decision is *Barr v. Matteo*, 360 U.S. 564 (1959), where the question was whether press releases of the Acting Director of the Office of Rent Stabilization were within the scope of his official duties and therefore "privileged" against a suit for libel. In finding that they were, this Court ruled that the guiding test for determining whether a Federal officer's action is within the scope of his official duty is "the relation of the act complained of to 'the matters committed by law to his actual supervision, Spalding v. Vilas, . . .'" (at 573-74).

How close to the predominant nature of such official duties need the Government official's action be? It is sufficient, said this Court, if the action comes "within the outer perimeter of petitioner's line of duty" (575).

The Court's rationale in *Barr v. Matteo* has direct relevance to the invalidity of the doctrine adopted below in the instant case:

> "That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for 'the same considerations which underly the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the con-

cept of duty encompasses the sound exercise of discretionary authority" (at 575).

In a concurring opinion, Mr. Justice Black took special note that "the subject matter discussed in the release was germane to the proper functioning" of the government agency concerned. He continued:

> "It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. See Spalding v. Vilas . . ." (at 577).

In *Barr v. Matteo*, this Court cited with approval two former decisions from other fields unrelated to defamation, in which the underlying issue was the same. *United States v. Birdsall*, 233 U.S. 223 (1914) involved an employee's improper receipt of monies. There Mr. Justice Hughes set forth this Court's criterion of "official action" as follows:

> "To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting . . . Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities . . . In numerous instances, duties not completely defined by written rules are clearly established by practice . . ." (at 230-31).

A similar rule was earlier enunciated in *United States v. MacDaniel*, 7 Pet. 1, 14 (1883), a suit by the Government for recovery on settlement of a Navy official's accounts.[34]

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[34] Similar positions on this same dispositive legal issue have been taken by at least three courts of appeals: Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949), per L. Hand, J., *cert denied* 339 U.S. 949 (1950); U.S. v. Jones, 204 F. 2d 745, 754 (7th Cir. 1953) *cert. denied* 346 U.S. 854 (1953) (not a libel case); Preble v. Johnson, 275 F. 2d 275, 278 (10th Cir. 1960). *Query*, whether the court below was consistent with its own previous decisions on this subject arising in malicious prosecution actions

Thus, it is clear that the rule announced by the Court in *Barr v. Matteo* is of general applicability in determining when action by a Government employee is within the scope of his "official duty".

The position espoused before this Court by the U.S. Government on this very issue of the scope of a Federal employee's official duties is both pertinent and instructive. The Government's Petition for a Writ of Certiorari in *Barr v. Matteo*, stated (at pages 11-12):

> "In *Spalding v. Vilas*, supra, this Court held that, in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that the general legal authority for the act existed—*i.e.*, that the statements have 'more or less connection with the general matters committed by law to his control or supervision', 161 U.S. at 498-9".

The Government's Brief on the merits interpreted the *Spalding Case* as follows:

> ". . . it is not necessary that the official be under a positive legal duty to act; it is sufficient that general legal authority for the act existed . . . So far as official communications are concerned, the doctrine of Spalding v. Vilas has not been limited to heads of executive departments but has been applied to government officials of lesser rank" (at p. 12).
>
> "And in Cooper v. O'Connor, 99 F. 2d 135 (C.A.D.C), certiorari denied, 305 U.S. 643, the court ruled that in order for an act to be within the scope of official duties it was not necessary that it be prescribed by a statute or specifically directed or requested by a superior officer" (at p. 17).

The Solicitor General there claimed, in terms quite apposite to the instant case, that the court below had adopted "an artificially restrictive test of 'line of duty', one which fails to take

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[Cooper v. O'Connor, 99 F. 2d 135, 139 (D. C. Cir. 1938), *cert. denied* 305 U.S. 643 (1938), cited with approval in Hoffman v. Halden, 268 F. 2d 280, 300 (9th Cir. 1959)], as well as in Government defamation [Glass v. Ickes, 117 F. 2d 273 (D. C. Cir. 1940), *cert. denied* 311 U.S. 718 (1941)].

into account the nature of the officer's functions and the circumstances necessitating and justifying his decision . . ." (Brief, p. 16).

Petitioner respectfully submits that the court below adopted an erroneous rule of law governing the test for a "Government publication", and that the correct rule of law—vouchsafed for both by reason and authority—is that a publication is a "Government publication" within the meaning of the applicable provisions of the Printing and the Copyright Laws, when it is prepared by a Federal official or employee acting within the scope of his official duty. Such action within the scope of official duty arises when the publication is connected with or directly related to such official duty.

III. Respondent's speeches at issue were within the scope of his official duty and therefore were "Government publications" not subject to copyright.

The undisputed evidence of record in this case, as well as in the public record, demonstrates that the Respondent's speeches in question were within the scope of his official duty because they were connected with or directly related to his official duties.

It is important to bear in mind the nature of Respondent's official duties and responsibilities. He is a Vice Admiral of the United States Navy, and Assistant Chief of the Navy's Bureau of Ships for Nuclear Propulsion. At the same time, he is Assistant Director of the Naval Reactors Branch of the Division of Reactor Development, United States Atomic Energy Commission.[35] The very fact that he holds two such vitally important positions at the same time is an indication of the importance of his position in terms of Federal nuclear energy developments and naval nuclear power plants.

Among the specific assignments that resulted from Admiral Rickover's very important position, as the Congress itself stated

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[35] Respondent worked under the budgets of both the Department of Navy and the AEC. *Hearings House Approp. Subcom., 86th Cong., 2nd Sess., Public Works Appro. for 1961*, AEC, Part 3, p. 227.

in awarding him a special medal,[36] were the development and construction of

1. the world's first nuclear powered ship, in particular the world's first nuclear powered submarine, the *Nautilus*, and

2. the first large-scale nuclear power reactor devoted exclusively to the production of electricity, the Shippingport Atomic Power Station.

It is generally recognized that the Respondent is the father of the nuclear submarine[37] and of the Shippingport reactor.[38] For these accomplishments, and for his other many important contributions to the welfare and security of the nation, Petitioner joins millions of other American citizens in paying respect to the Respondent.

1. *These speeches deal with subjects connected with or directly related to Respondent's official duty.*

What did Respondent himself say on this crucial issue?[39] Of the 23 speeches in question, 10 deal primarily with atomic power and naval warfare, 10 others primarily with the relation of national defense to education, and 3 with occasions involving Respondent's receipt of an award.

A. *Speeches Dealing with Atomic Energy and Naval Warfare.*

(i) Ten of the 23 speeches deal with nuclear energy, the industrial aspects of nuclear energy as applied to naval vessels and their construction, and the technical revolution wrought by nuclear energy in naval warfare. A few examples will illustrate the point. The first speech, "Metallurgy in Atomic Power", is devoted from the outset to "major problems in the use of metals

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[36] P.L. 85-826, August 28, 1958.

[37] Senator Jackson, member of Joint Committee on Atomic Energy, 104 CONG. REC. 16915 (Aug. 11, 1958).

[38] *Id.* at 18108 (Aug. 18, 1958).

[39] The Trial Court found that "some of them [Respondent's speeches] dealt with ideas that the Admiral developed in connection with his activities as a Naval officer", 177 F. Supp. at 602. See also Pilpel, *But Can You Do That?*, PUBLISHERS' WEEKLY, Dec. 26, 1960, p. 31. ("The speeches dealt with subject matter with which the Admiral was officially concerned. . . .")

in the application of atomic energy to the propulsion of ships" (R.69) and to Respondent's asking his audience, The National Metals Congress of the American Society for Metals, for help to "solve them [such problems]" (R.69). The speech's fourth paragraph reads:

> "Although I will discuss primarily the problems associated with naval plants, I am sure you will recognize that what I say applies with equal force to nuclear power plants for central stations, such as the one we are building at Shippingport, Pennsylvania."

Thus, the Respondent himself states that this first speech is directly related to his two main official responsibilities, nuclear vessels and central nuclear power plants.

(ii) The theme of the second speech, "Nuclear Power and the Navy" (which was substantially the same textually as the 5th speech, R.105), is "the impact of nuclear power on the Navy", and "two of the basic principles of waging Naval warfare" (R.71). In this speech Admiral Rickover describes at considerable length "the advantages of nuclear propulsion" to naval warfare (as exemplified by his own project, the NAUTILUS, America's first nuclear submarine), the history of the development of the NAUTILUS and of the intergovernmental relations which made its development possible, the Navy's plans for future nuclear submarines and surface vessels, and the plans of the Atomic Energy Commission in developing a group of nuclear power plants for the Navy.

Respondent's own words, in the last two sentences of this second speech, bespeak its close connection with his official duties: "However, it is impossible for one who has been so closely connected with nuclear power, and for so long a time as I have been, to achieve a completely detached viewpoint. So, it is only fair to mention that my remarks may have been colored by the favorable light one tends to cast on his own work."

It is important to note that it was in the context of this second speech that the following comments on education were made by Respondent:

"In our work, as in every venture, trained people are essential. In the early days, and over the protests of my leading people who did not want to interrupt their work, I sent many of them and also our new young people away for advanced technical training in nuclear engineering. At the time it seemed the wrong thing to do because of the extremely heavy work load. But we knew that we had to develop many technically qualified people if we were to become an effective organization. Similar educational steps had to be taken by our contractors. Those of us who remained behind had to carry the burdens of the ones who went away to learn, but we became the stronger for it. The benefits from this technical training convinced me that it should be continued. As a result, nearly everyone who has joined us since the beginning, in 1948, has been sent away for additional training" (R.72).

We shall return at a later point to consideration of those of Respondent's speeches which deal with the relation of national defense to education, but in that context it is important to note that Respondent himself here regards his educational activities as part of his own work.

(iii) Respondent's 8th speech, "The Challenge of Nuclear Power", exhorts industry to help in the technical and industrial aspects of his official job:

"Just as the strength of a chain is no greater than that of its weakest link, so does the successful operation of a nuclear power plant depend on the reliability of all its parts — not alone the nuclear reactor, but also the heat exchangers, pumps, valves, etc. In fact, our experience with the four operating plants of the Naval Reactors Program has shown that it is these components which have proved less reliable than the nuclear reactor itself. Also, . . . their delivery time is poor . . . Here, I believe, is . . . a challenge to industry" (R.75).

The 7th speech, "Nuclear Power—Challenge to Industry", was in the same vein.

(iv) The 14th speech, "Revolution at Sea", had as its theme: "Today our Navy is in the midst of another change—conversion

from oil to nuclear power . . . Let me give you a brief timetable" (R.82). The 11th speech was substantially the same in theme and in much of its contents (R.79). Both the 11th and 14th speeches dealt with the conversion of the Navy to nuclear energy and with the resulting effect on the future of naval warfare. The same theme, the changing nature of naval warfare, appeared in the 20th speech, "The Meaning of the Nautilus' Polar Voyage" (R.89).

(v) While it was not one of the first 23 speeches, another of Respondent's speeches introduced into the record dealt with his central nuclear power plant duties: "The Shippingport Atomic Power Station: Lessons From Its Operation" (R.98).

(vi) One needs no more than Respondent's own words, from the very speeches under consideration, to realize that the 10 speeches devoted primarily to nuclear energy and naval vessels or naval warfare, and derived from information uniquely available to him because of his official position,[10] were unquestionably within the scope of Respondent's official duties as the Navy's No. 1 man for the development of the nuclear submarine who also simultaneously served as Assistant Director of the Naval Reactors Branch of the Atomic Energy Commission. Therefore, quite independently of the fact that they were all issued as official Government press releases, copies of such speeches were "Government publications" within the meaning of the Printing and Copyright Laws and were not legally subject to copyright.

B. *Speeches Dealing With the Relation of National Defense to Education.*

Nine other of the first 22 speeches dealt primarily with educa-

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[10] "In *Rickover*, much of the information which formed the nucleus of Rickover's speeches, such as those concerning atomic energy, and submarines, was acquired in his position as an Admiral", *op. cit. supra* note 32, at 542. *Cf*: President Kennedy's statement opposing the practice of Government employees "using for private gain official information which is not available to the public", Message to Congress, "Ethical Conduct in Government", H. Doc. No. 145, 87th Cong., 1st Sess., p. 7 (April 27, 1961).

tional subjects. While *ab initio* perhaps some of them could have been regarded as not connected with or directly related to Respondent's official duties, this issue is foreclosed by their issuance (with Respondent's approval) as official Government press releases. As has already been indicated, Petitioner's position is that this fact alone, under the circumstances disclosed in this case, is conclusive upon their being "Government publications."

However, the 23rd speech, which also dealt with education, was not released as an official Government press release. Therefore, the test of "official duty" is critical in determining whether this 23rd speech was a "Government publication".

The 23rd speech was entitled "Education: Our First Line of National Defense". Therein Admiral Rickover said:

> "Though I have never taken a course in 'education', *I have been running schools for years.* Everyone in my atomic power group has taken a hand at some time or other at teaching what he has first had to teach himself about the new science of engineering. *We have set up schools for our own engineers and for industrial people, as well as for the officers and men who will operate our nuclear ships. In our post-graduate program we teach the exacting requirements of reactor design, construction and management.*" (R. 96). (Emphasis added throughout in connection with this speech.)

Admiral Rickover is a distinguished engineer employed by the U.S. Government. His educational concerns, he says, come out of this fact:

> "As any engineer would, I noticed many years ago that Russia, with her tremendous new educational program . . . was gaining momentum at a time when we were losing momentum. This shows up in the constant lengthening of lead time in this country . . . As an engineer, engaged in pushing through a new engineering project, it has long been obvious to me that we cannot shorten lead times . . . unless we find ways to remove the many roadblocks . . . Nearly all those roadblocks are caused by people whose education has not prepared them for the extremely difficult problems which arise when we

seek to progress beyond present levels of technology . . . " (R. 96-97).

What did the Respondent, as a government official "engaged in pushing through a new engineering project", think took up his time and energy on the job?

> "*It is no exaggeration to say that a major part of our time has been taken up with fighting for higher levels of performance which are resisted because their necessity is not understood . . . Resistance comes from . . . an inflexibility which has its roots in an educational system that does not prepare young people for life in our constantly changing world*" (R. 97).

Admiral Rickover makes it crystal-clear that he is talking about *difficulties confronting him in recruiting his own official staff for his own official assignments*:

> "I have interviewed more than two thousand young men in the last twelve years, all top men in their college class.[41] My naval reactor engineering group presently numbers about 150. Since the men who came to see me had already passed through a number of previous interviews where all but the best were eliminated, it is evident that those who could not meet the requirements of the nuclear power project—and hence inferentially of any new development project—vastly outnumbered those who qualified."
>
> "This experience made a deep impression on me. *It led me directly to a study of why our educational system produces so few men who are qualified to do the work we must do if we are to progress.* I found that our schools are the greatest 'cultural lag' we have today" (R. 98).

Your Petitioner does not wish to be misunderstood in this connection. Respondent is to be commended for his broad vision of the responsibilities placed upon him by the enormously

[41] This theme recurs in several of the "educational" speeches, e.g., the 5th (R.105). See also Respondent's testimony as to same practice with Naval Academy students, *Hearings before the Subcom. of the House Com. on Appro.*, 87th Cong., 1st Sess., Part 3, "Public Works Appropriations for 1962", 1518.

important tasks committed "to his control or supervision". But he cannot have it both ways. If while performing his official duties education is part of his job,[42] then he cannot elsewhere validly contend that education is solely an avocational interest. The 23rd speech is, therefore, clearly within the scope of duty commited to Respondent's "control or supervision."

No useful purpose would be served by extended quotations from all of Respondent's so-called "educational" speeches. However, it is well to note the remarks and circumstances in connection with the 15th speech, "Education in the Nuclear Age". This speech was delivered, as the Atomic Energy Commission's Press Release states on its face, "on the Occasion of the Dedication of Nuclear Power Training School", located at the U.S. Naval Base at New London, Conn. (R. 84), a school which Respondent created, as will be described below. Perhaps nothing else shows so much the inextricably interrelated nature of education to Respondent's official duties. Here is what the Navy's No. 1 nuclear power expert said in delivering the dedicatory address to the nuclear power training school he had created:

> "It may well be asked: why need we select this group of men from among many and send them to a special school not open to the rest of their colleagues? The answer is simple: we have no choice.
>
> "We have no choice but to develop a new kind of navy man to run a new kind of naval ship. The school provides the kind of education needed by the officers and men of a nuclear navy" (R. 85).

And the relation of all this, in his own work, to the broader educational themes on which he sometimes expounded, is stated by Admiral Rickover thus:

> "Once the American public realizes the desperate con-

[42] Counsel for Respondent said before the Trial Court: "The Admiral's interest in the subject of education . . . was stimulated by his experience in the Navy. In recruiting scientific personnel for his work on nuclear propulsion no one can say that he is not interested in improving the Naval Service . . ." (R.29)

sequences of our great shortage of trained man power in terms of national well-being in a resources-poor future, and of our very existence as an independent and strong nation; once the connection is made in everyone's mind between education and lack of vitally needed scientists and engineers—there will I hope be action to undo the educational harm of the past half century. But we in the Navy cannot wait for this to happen. For we dare not fail our responsibility always to have ships and men at their maximum technological potential, so that we may be able to protect the freedom and liberty of our country in any war, hot or cold" (R. 87-88).

As Respondent himself earlier told the Congress:

"I was forced into the educational problem because I saw the poor products of our educational system. That is what got me started. I am a customer for the products of our schools. I tried to get people to help me do a job in nuclear power development, and I found the product of our schools quite unsatisfactory, so I set out to find the reasons."[43]

Lest there be any thought that the 23rd, the last, of the Respondent's speeches here involved indicated a new scope of his official duty which was not present at the time of the earlier speeches, it is well to note the following excerpt from Respondent's testimony before a House Appropriations Subcommittee on June 27, 1956:

"*We run quite a number of schools of our own because there is a great shortage of scientists and engineers*, and we found we could not depend too much on schools and on available training programs. We found we had to train our own people in order to get ahead. Had we depended on the state of education or training of the new people who entered our program, we could never have done our job. *We are running at the present time a number of different schools within the naval program. These schools range from the one at the submarine base at New London, Conn., for teaching nuclear*

[43] "Report on Russia by Vice Admiral H. G. Rickover, USN", *Hearings Before the Comm. on Appro., House*, 86th Cong., 1st Sess., p. 2 (August 18, 1959), hereinafter cited as "*Rickover Report*".

theory to officers and enlisted men, to others which teach physics and nuclear design to scientists and engineers. We are training engineers and we are training scientists. That is a constant thing that goes on all the time." [44]

The Congress itself has confirmed Respondent's own judgment that education was part of his official job in working with nuclear submarines. The Chairman of the Joint Committee on Atomic Energy stated:

"The committee continues to be impressed with the careful attention Admiral Rickover devotes to the selection and training of personnel who operate naval nuclear propulsion plants and those who are technically involved in reviewing their design, construction, and operation. We strongly urge that there be no relaxation of Admiral Rickover's practice of insisting on personnel of exceptionally high mental capacity and dedication." [45]

(1) Respondent's Official Educational Duties

The above-cited quotations from Respondent's own speeches indicate his own clear assertion that education is an integral part of his official Government job. This is true in very specific ways, not merely in a general rhetorical sense.

a. Naval Nuclear Propulsion Training Program

Respondent created his own official school within the Department of the Navy,[46] in order to enable him to do his official job.

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[44] *Hearings Before House Appro. Subcom., Second Supplemental Appropriation Bill 1957*, Part 2, "Investigation of Atomic Electric Power", p. 141-42 (emphasis added).

[45] *Hearings Before the Jt. Com. on Atomic Energy*, "Naval Reactor Program and Polaris Missile System", 86th Cong., 2d Sess., p. VI (April 9, 1960). To same effect, see Chairman of House Appropriations Subcom., *Hearings Before House Approp. Com.*, 87th Cong., 1st Sess, "Public Works Appropriations for 1962", Part 3, p. 1528-29.

[46] *Cf*: ". . . to create a large and unique educational operation of one's own (which Rickover has done in the schools of the Naval Reactor Program, now enrolling nearly 2,000 students) . . .", Koerner, *Movers and Shapers of Education—Admiral Rickover: Gadfly*, SATURDAY REVIEW, April 15, 1961, 62. See also Preface to RICKOVER, EDUCATION AND FREEDOM (1959), quoted below.

This school's official *Catalog of Information*[47] opens with a quotation from Respondent on the "naval revolution", taken from the 14th speech.[48] It points out that Admiral Rickover's education program has two separate school campuses, one the Nuclear Power Department of the U.S. Naval Submarine School at New London, Conn., established in 1956, and the other established two years later as the U.S. Naval Nuclear Power School at Mare Island, California (p. 5). The catalog also shows that other special training and educational programs were established in this field as far back as 1950 and that other training units were set up in various places about the country. The curriculum contains a "considerable amount of course material analagous to college courses" (p. 10), and requires a year for completion (p. 8) on the basis of 8 hours a day for 5 days a week (p. 15).

b. Other educational activities in the Navy and the Atomic Energy Commission.

Still other specific educational activities have been part of Admiral Rickover's official duties. Here again, we let Respondent speak for himself:

> "I was instrumental in setting up the Oak Ridge School of Reactor Technology. I also assisted in setting up the first nuclear engineering course at the Massachusetts Institute of Technology and I am presently on an advisory committee to Princeton University to help them revise their mechanical engineering curriculum."[49]

According to its official publication, the Oak Ridge School of Reactor Technology offers a full 9 month academic program open to engineers or persons of equivalent background, at a

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[47] The Naval Nuclear Reactor Propulsion Training Program—*Catalog of Information*, published in 1960 by the U. S. Government Printing Office.

[48] P. 4 (this is a quotation from the speech "Revolution at Sea", R.32, 5th paragraph).

[49] Testimony is response to a congressional question asking Respondent "to state your qualifications for talking about education". *Rickover Report, supra*, p. 2.

tuition fee of $2,000 per year. In its first seven years of operation, this school graduated "over 700 engineers and scientists".[50]

Another example of the essential connection of education to Admiral Rickover's duties is his schedule during an official visit accompanying the Vice President of the United States to the Soviet Union and Poland.[51] According to his testimony before the House Appropriation Committee, his three major activities on this official visit were as follows: 1) inspection of the Soviet nuclear ice-breaker, 2) inspection of a central electric power station,[52] and 3) conferences with the Soviet and Polish Ministers of Education,[53] visits at Moscow University and other educational institutions in Soviet Russia[54] and in Poland,[55] and a talk with Soviet Premier Krushchev on education.[56] All of this was done during, and as part of, an official trip, in the course of his official duty and was reported to the Congress as "my duty to do it".[57]

Nor is it inappropriate to note that the Atomic Energy Commission, of which Admiral Rickover is a distinguished and high ranking staff officer, has extensive educational programs in educational institutions throughout the nation, and makes extensive and substantial financial grants to colleges, graduate students and teachers for the purchase of equipment, the operation of schools, the training of teachers, fellowships, and the development of pedagogical tools such as training materials and laboratory manuals).[58] In a speech before the National Science Teachers Association, AEC's Chairman Seaborg stated:

> "The AEC has assisted in the development of more than 400 seminars, workshops, institutes and lecture programs all over the country. Usually, they have been sponsored by

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[50] Oak Ridge National Laboratory, Oak Ridge School of Reactor Technology 1-4 (1961).

[51] U.S. News and World Report, Aug. 10, 1959, p. 19.

[52] *Rickover Report, supra*, 36.

[53] *Id.* p. 2.

[54] *Id.* p. 25.

[55] *Id.* p. 27.

[56] *Id.* p. 26.

[57] *Id.* p. 31.

[58] AEC, Annual Report for 1959 (1960), pp. 600, 142-3.

teacher training schools, state boards of education or local school districts. The attendance has been principally high school and elementary school science teachers.

"The Commission produced two handbooks for use by high school teachers in conducting radioisotope experiments. The nuclear exhibits programs, which includes high school demonstration units, have drawn a cumulative attendance of more than 35 million persons.

"In cooperation with the Oak Ridge Institute of Nuclear Studies, the Commission has trained selected science teachers and sent them out for two weeks' stay at schools to help improve the quality of science teaching at the secondary school level . . . "[59]

Similarly, a large variety of educational programs has been extensively conducted and sponsored by the Navy Department.[60]

(2) *The Public Record*

Admiral Rickover himself asserts that education was and is part of his official duties. There is independent evidence, of public record, to prove this fact. Witness, for example, Respondent's book, EDUCATION AND FREEDOM, published in 1959,[61] which is on file with the Court as Exhibit 19 below. In the Foreword to this book, Edward R. Murrow, now Director of the United States Information Agency, wrote: "Admiral Rickover is no theoretical pedagogue. His attitude toward American education was the result of practical experience . . . " (p. 6)

[59] AEC Press Release No. S-3-61, for release March 28, 1961.

[60] See, e.g., Secretary of Defense, Annual Report, July 1, 1958 to June 30, 1959, p. 236; Dept. of Navy Approp. 1958, *Hearing, House Approp. Subcom.*, 85th Cong., 1st Sess., p. 336 *et seq* ; *Dept. of Defense Approp. for 1961, Hearings, id.*, 86th Cong., 2nd Sess., Part 3, pp. 463, 515. In addition, 13.5% of all of the Navy's Research and Development obligations for fiscal year 1961, and 10.5% of all of AEC's were to educational institutions, *Senate Committee on Gov. Operation*, Sen. Rep. No. 263, 87th Cong., 1st Sess., "Coordination of Information, Current Scientific Research & Development Supported by the U. S. Govt.", p. 33 (May 13, 1961).

[61] The instant case raises no issue, and Petitioner has made no claim, concerning the validity of copyrighting this book.

And in a preface to the same book, Mr. Charles Van Doren, then of Columbia University, said:

> "The first reaction of many Americans to Admiral Rickover's temerity will be to ask what right he has, since he is not a professional educator, to write of education . . . It is of course not quite fair to imply that Admiral Rickover is an amateur. Among other things, his book discusses the educational program the author has integrated in the course of designing and building the first atomic ships, and the first central station atomic power plant at Shippingport, Pennsylvania. The men who must make and man them, the Admiral discovered, could not be prepared for the task by any existing educational system; he therefore invented a system." (p. 8)

The professional nature of Respondent's educational activities is attested, for example, by United States Senator William Proxmire, who said: "It has been said that Admiral Rickover may be a great Navy man—but he has no real experience as an educator. This simply is not true. The Admiral has not only had substantial experience, he has had eminent success as a professional educator."[62]

Another public recognition of the Respondent as a professional educator appears in the Educational Section of TIME for May 12, 1961 (pp 63A-B):

> "For his salty criticism of U.S. schools, Admiral Hyman G. Rickover is often dismissed by professional educators as an out-of-his-depth amateur. *In fact, Rickover is a seasoned schoolmaster running one of the most efficient school systems in the U.S.*: the Navy's little-known Nuclear Power Schools at New London, Conn., and Mare Island, Calif.
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> "Rickover lauched them in 1956 and 1958 because he considered the products of U.S. schools illiterate in science and unfit for nuclear sailing. In his own 24-week schools, which already have 2,000 alumni, Rickover hurls college courses at enlisted men and graduate courses at officers, with an in-

[62] *Congressional Record* (Daily Edition), May 12, 1961, p. A3326.

tensity that is probably unmatched anywhere else."

The TIME article continues with the following description of the curriculum in Respondent's own schools and of his own personalized role in the actual instructional and pedagogic process:

"The curriculum is a fat-free diet of pure math, physics, chemistry, electronics, engineering and health physics (to guard against radiation) that goes on for seven 50-minute periods a day, plus an average of four hours of homework done in a tiny, distraction-free cell. Teachers are on duty for help around the clock, and RICKOVER himself often *conducts a final oral exam.*

"Last month 500 more students entered the schools after rigorous selection and anguished boning up on calculus. *Rickover personally screens every officer who enters, grills every enlisted man who flunks to find out why. He checks the courses and picks the teachers,* many of them former college professors now happily authorized to toss erasers at window gazers—if any." (emphasis added)

That Respondent's official school is more than a trade school appears from the following:

"Just to make sure the studying takes, Rickover requires requalification tests aboard ship. A man has to study to keep his rating, study harder to get ahead. This produces an odd personnel problem: a steady drain on savvy chief petty officers as they get commissions. Compared with the Navy as a whole, 30 times more Rickover sailors become officers. "You lose 20% of your people," growled one sub commander last week as he stared at a couple of CPOs hunched over books as well as black coffee. That fails to daunt "the admiral," as he is called without further identification. Says Rickover: "*The main thing is that the men have been taught to think. It just shows what we can do with all our youngsters if we try.*" (emphasis added)

c. Speeches on Acceptance of Awards.

The remaining three speeches were delivered by Respondent in connection with his acceptance of awards made to him in

recognition of his outstanding contributions in the field of nuclear power and naval developments.[63] We shall cite from only one of these speeches, No. 12, that delivered in Italy on the occasion of the bestowal of the International Communication Award for 1957. There Respondent said: "I am highly honored to have been chosen for this year's 'Christopher Columbus' Award which I gratefully accept on behalf of the Government and the Congress of the United States" (R. 80).

What more positive or persuasive proof could one want that education was directly related to and connected with Respondent's official duties than his own speeches and the official record attesting that as he saw it the efficient performance of his official job required him continuously to study the effectiveness of the existing educational system in providing the knowledge and skills he deemed necessary for his own staff, that his job required him to create various schools within the Navy and A.E.C., and that because of his job "I have been running schools for years"?

Petitioner respectfully submits that on the basis of the connection with and the relationship of the subject matter of the 23rd speech with Respondent's official duties, that speech is within the scope of his official duties. Therefore, although it was not issued as a Government press release prior to its delivery, the release copy of the 23rd speech was a "Government publication" not subject to valid copyright.

CONSTITUTIONAL ARGUMENT — Respondent's securing of copyright monopoly over speeches made publicly within the scope of his official duty is a denial of freedom of press under the first amendment.

At the end of the last term, the Court said: "Federal statutes are to be so constructed as to avoid serious doubt of their constitutionality".[64]

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[63] See, for example, comment of Senator Anderson, 104 Cong. Rec. 16983 (Aug. 11, 1958).

[64] International Association of Machinists v. Street, 367 U.S. 740, 749 (1961). See also Dennis v. United States, 341 U.S. 494, 501 (1952); Communist Party v. Catherwood, 367 U.S. 389, 392 (1961).

Elsewhere the Court has "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same".[65]

Petitioner respectfully submits that, in order to avoid an unconstitutional result as applied to the facts of this case, the proper application of the First Amendment's provision protecting Freedom of Press requires interpreting the statutory terms "Government publication" and "any publication of the United States Government" to encompass Respondent's 23 speeches issued in multilithed or processed form.

Petitioner submits this Constitutional Argument for two purposes:

1) to confirm the Statutory Argument as to the proper construction of the operative statutory terms under the facts of this case, and

2) in the event that such Statutory Argument fails of persuasion, to demonstrate that the United States Government's action in issuing, and the Respondent's action in receiving, copyright registration on his official speeches abridges Petitioner publisher's Freedom of Press under the First Amendment.

Even where it has not been necessary to reach constitutional issues to decide a case before it, the Court has specifically expressed its view on the constitutional questions which would have been present "if reached by the court."[66] On occasion the Court has deliberately decided to reach the constitutional issue, although the case could have been decided on other grounds, because it was necessary to solve such constitutional issue in order to avoid future difficulties.[67]

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[65] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). See also United States v. Rumely, 345 U.S. 41, 45 (1953) and cases therein cited.

[66] Peters v. Hobby, 349 U.S. 331 (1955); Kent v. Dulles, 357 U.S. 116, 129-130 (1958). *Semble*, Rice v. Sioux City Cemetery, 349 U.S. 70, 72 (1955). See also Volanski v. United States, 246 F. 2d 842, 845 (6th Cir. 1957), per Stewart, C. J.

During the last term the Court indicated that it will delve into certain areas, albeit rarely, "not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights".[68]

In this connection, the Court's attention is respectfully called to the system of substantial evasion of the law which is described in the Petition for a Writ of Certiorari in No. 649, October Term, 1961, pp. 18-22 and the related appendices.[69]

The constitutional questions in this case are twofold:

1. Does the First Amendment's guaranty of Freedom of Press permit a high-ranking, policy-forming Government official to receive, and the United States Copyright Office to issue, copyright registration on speeches which were delivered while he was on official duty and on subjects connected with and directly related to his official duties?

2. Does the First Amendment permit the United States Government to acquiesce in a Federal employee's receipt of a private copyright on a "Government publication", thus authorizing a private monopoly over officially released Government material against the press and the American people?

I. Freedom of press protects the American people's *Right To Know* what their Government officials do and say.

1. *The people's right to know is the raison d'etre of a free press.*

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[67] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). *Cf*: United States v. U.S. Gypsum Co., 333 U.S. 364, 387 (1948) ("While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent.")

[68] Scales v. U.S.A., 367 U.S. 203, 230 (1961).

[69] As recently as last June, the House Committee on Appropriations expressed grave concern about "subterfuge" employed by the Department of Defense and other agencies in using non-profit private corporations to avoid statutory restrictions. House Report No. 574, 87th Cong., 1st Sess. (June 23, 1961), p. 53.

The American people's rights are at stake here, although they do not appear as party to the suit. The Bill of Rights exemplified a clear rationale for Freedom of Press: 1) that a free society cannot survive without full knowledge of its Government's activities, and 2) that a free press was the only instrumentality for protecting the American people's *right to know*.

This Court has long recognized that a free press is essential for a free people. In *Associated Press v. United States*, 326 US 1, 20 (1945), Mr. Justice Black wrote for the Court: "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

Mr. Justice Frankfurter said in the same case that "the business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them," and that the basic function which a Constitutionally guaranteed free press serves in our nation "is to have the flow of news not trammelled." (p. 28, 29).

Cooley saw freedom of press in the same light: "The evils to be prevented (by the First Amendment) were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[70]

2. *The right to know is essential for a free people's capacity to control its government.*

The founders of our nation saw in a free press the means of enabling a free people to remain free by maintaining public accountability of its Government and Government officials. James Madison was chairman of the committee that drafted the First Amendment and presumably knew its purpose.[71] He wrote: "The right of freely examining public characters and measures,

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[70] 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

[71] PATTERSON, FREE SPEECH AND A FREE PRESS 121 (1939).

and of free communication thereon, is the only effectual guardian of every other right . . . "[72]

Throughout our national history this concept of the press as an instrumentality of the American people for the control of its government has been pervasive in judicial readings of the First Amendment. In *Grosjean v. American Press Company*, 297 U.S. 233, 250 (1936), Mr. Justice Sutherland wrote in connection with a claim of abridgement of freedom of press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information . . . Since informed public opinion is the most potent of all restraints upon mis-government, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *United States v. Rumely*, 345 U.S. 41, 56 (1953) Mr. Justice Douglas (concurring) said: "The aim of the historic struggle for a free press was 'to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government' . . . That is the tradition behind the First Amendment . . . "

And in *Roth v. United States*, 354 U.S. 476, 484 (1957), Mr. Justice Brennan recognized this same objective as the motivation for constitutional protection of Freedom of Press:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
>
> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the ad-

[72] 6 WRITINGS OF JAMES MADISON 398 (1906 ed.). *Cf.* "Nothing is more vital in government than the freest possible flow of information", Pierre Salinger, White House Press Secretary, N.Y. Times, March 21, 1961, p. 27, col. 4.

vancement of truth . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' 1 Journals of the Continental Congress 108 (1774)."

3. *Freedom of Press is a right of the American people; the press is a trustee of that right.*

Freedom of Press was not designed as a special privilege for the publishing business, but rather as an extension of the personal rights of each American. It is a guaranty of the individual's rights, and was thus joined in the Bill of Rights with the rights of free speech, assembly and petition.

This Court has characterized "the freedom of speech and that of press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." [73]

It has been judicially recognized that "The doctrine of freedom of the press is not for the benefit of the press but for the benefit of the people. Newspaper publishers, therefore, have a high degree of responsibility to preserve the doctrine of freedom of the press for the benefit of the people, not for their own benefit." [74]

"Free press" is only a shorthand way of saying that the press must be free because of the right of all Americans to be informed. Arthur Hays Sulzburger of the *New York Times* addressed the Trustees of the New York Public Library on this issue:

"Perhaps we ought to ask ourselves now just what freedom of the press really is . . . Freedom of press—or, to be more precise, the *benefit* of freedom of the press—belongs to every-

[73] Schneider v. State, 308 U.S. 147, 161 (1939).

[74] United States v. Powell, 171 F. Supp. 202, 205 (N.D. Calif. S.D. 1959), per Goodman, Ch. J.

one, to the citizen as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community than is accorded to other citizens. He enjoys an explicitly defined independence because it is the only condition under which he can fully perform his role, which is to inform fully, fairly and comprehensively. The crux is *not* the publisher's freedom to print; it is rather the citizen's right to know! What I would point out is that freedom of the press is your right as citizens and not mine as a publisher." [75]

Col. Robert R. McCormick of the *Chicago Tribune* said: "The freedom of the press is the freedom of the American people." [76]

The Editor-in-Chief of the *Waterbury (Conn.) Republican American*, E. R. Stevenson, wrote: "Let us consider what freedom of the press is. It is really something that belongs to all the people and is not the treasured possession of a privileged class known as Editors . . . It is the one instrument of the American people through which they can protect their freedom. . . . Freedom of the press belongs to you, the people, and is of utmost importance to you in maintenance of your freedom. Fight for it against the government if need be; fight for it against any newspaper, if need be." [77]

Elisha Hanson, distinguished counsel for the American Newspaper Publishers Association, put it thus:

"The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in printed form. Publishers are but trustees of this right. Thus the press not only has the obligation to gather and disseminate information of general public interest, but it has the greater obligation—that of preserving the right of the people to have a press free from restraint in the performance

[75] Nov. 13, 1956. Privately printed, p. 9. (Available at New York Public Library, 42nd Street Branch, New York City.)

[76] McCormick, THE CASE FOR FREEDOM OF THE PRESS 23 (1933).

[77] *What is Freedom of the Press*, SPECIAL LIBRARIES, Vol. 32, No. 6, pp. 206-08 (July-Aug. 1941).

of its function and from whatever source restraint may spring." [78]

4. *Freedom of Press (the people's right to know) is indivisible.*

Respondent seeks to avoid the impact of the First Amendment by claiming he has sanctioned quotation of his speeches by newspapers and news periodicals.[79] The press is not free, in the constitutional sense, if publication can be arbitrarily limited or denied to any classification of publisher. This Court's rulings forbid such restrictive interpretation of Freedom of Press: "The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." [80]

Elsewhere, the Court said: "Freedom to publish means freedom for all and not for some." [81]

Mr. Justice Douglas' remarks in *United States v. Rumely*, supra, are peculiarly appropriate here: "We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people . . . Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas" (at p. 56).

The court below approved selective and discriminatory application of Freedom of Press, in a Government official's unreviewable discretion. Half-freedom is no freedom at all. If a Government official can determine which portion of the press, if any, may have Freedom of Press, the Constitutional mandate is moribund.

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[78] *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary*, 41 A.B.A.J. 217, 218 (1955).

[79] See, for example, his limited use of "press", Conditional Cross-Petition for a Writ of Certiorari, No. 739, October Term 1960, p. 14, 2nd paragraph.

[80] Lowell v. Griffin, 303 U.S. 444, 452 (1938), per Hughes, Ch. J.

[81] Associated Press v. United States, 326 U.S. 1, 20 (1945).

II. Freedom of Press (the people's right to know) requires freedom of access to publicly-released government materials.[82]

Freedom of Press is nullified without freedom of access to public information. As the *New York Times* editorially stated, freedom to produce a blank page is hardly freedom of press.[83] The President of the United States recognized this fundamental fact when he warned the Congress to protect ". . . the public's right to proper access to public information." [84]

The First Amendment would be sterile today if its sanctions were limited to the mere act of printing. The *Zenger Case* decided that over 200 years ago.[85] This Court has not so limited Freedom of Press: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." [86]

This Court has ruled that Freedom of Press protects not only the publisher's right to print,[87] and the distributor's right to circulate,[88] but also the *public's right to read.*

Butler v. Michigan, 352 U.S. 380 (1957), involved a state statute which made a criminal offense of the publication, sale and distribution of any literature "tending to the corruption of the morals of youth." The statute was challenged as an unconstitutional infringement of freedom of press and due process of law under the First and Fourteenth Amendments. The State's Attorney General denied that the statute did violence either to the free press clause of the First Amendment or to the due process

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[82] This case involves no question of security or executive privilege.

[83] May 31, 1957, §1, p. 26, col. 3.

[84] *Message to the Congress*, "Ethical Conduct in the Government", H. Doc. 145, 87th Cong., 1st Sess., p. 7 (April 27, 1961).

[85] As far back as 1644, Milton's *Areopagitica* was a defense of "the liberty of unlicensed printing", McKeon, Merton & Gellhorn, The Freedom to Read 43 (1957).

[86] In the Matter of Jackson, 96 U.S. 727, 733 (1878), cited with approval in Lovell v. Griffin, *supra* at 452.

[87] Lowell v. Griffin, *supra* at 452; Winters v. New York, 333 U.S. 507, 509 (1948).

[88] In the Matter of Jackson, *supra*; Winters v. New York, *supra*.

clause of the Fourteenth Amendment. And the Attorney General of Texas, *amicus curiae*, claimed that the book there in question was not within the protection of the First Amendment's freedom of press.

The Court unanimously found the statute unconstitutional:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society" (384-85).

Thus, the constitution protects more than freedom to print; without circulation to, and reading by, the public "the publication would be of little value."

The constitutional protection for Freedom of Press, as has been shown, was designed to achieve an end, *the right of the public to know* (by reading), and in particular the right of the public to read (and thus know) what its Government officials do and say. In order to accomplish this end—which the Court has ruled to be included within the constitutional protection of each individual American—it is necessary to have access. Freedom of Press must, at the very least, include *freedom of access* to materials officially and publicly released by the Government. Anything less would hamstring the fundamental objective of the First Amendment, the people's right to read as a means of achieving *the people's right to know.*

That freedom of access is an integral part of Freedom of Press has been recognized and asserted by legal scholars. A distinguished Federal judge wrote:

> "Governmental activities do not allow differentiation between what is private and what is public. All the business persons in public office, high or low, perform is of a *public nature.* So there is no conflict, as in the case of privacy, between the individual rights and the public's demands—but rather between the right of the public to be informed and the

arrogative right of persons in public office to withhold information."

"The adoption in the Federal and State constitutions of the guarantee of freedom of speech and press and of the other democratic rights led to the recognition of the right of access and publication of the activities of public men and public bodies."

"Ours is a government by discussion. Its strength lies in knowledge . . . Our democratic society derives its power from the people and must allow public access to all matters relating to the public's business. Only as the press serves the public right to know assiduously is the freedom of press important."

"If those in public office arrogate to themselves the unrestricted power to determine what information shall be made known to the public, it would become too easy for them to conceal their conduct and misconduct — their deeds and misdeeds." [89]

Harold L. Cross, Freedom of Information Counsel for the American Society of Newspaper Editors, and long-time Professor of Newspaper Law at Columbia University's Graduate School of Journalism, said:

"Freedom of information in the form of access to public records and proceedings is a constituent part—is, indeed, the very foundation stone—of freedom of speech and of the press under our 1st amendment . . .

"The history of the struggle for freedom of speech and of the press, as an overriding principle of democracy vested in every man, bars any notion that the men of 1791 intended to provide for freedom to disseminate information about Government but at the same time intended to allow Government to deny freedom of obtaining such information. Our forebears' purpose was to prevent 'any action by Government' by means whereof it might prevent free and general discussion. Without

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[89] Yankwich, *Legal Implications of, and Barriers to, The Right to Know*, 40 MARQ. L. REV. 3, 6, 33, 35 (Summer 1956).

a right of access to information, freedom to print information is fettered into futility." [90]

More close to home, so to speak, is a letter from the Hon. Murray Snyder, Assistant Secretary of Defense, to the Petitioner, Sept. 10, 1959, concerning the refusal of the Secretary of Defense to permit the Commanding General of the Strategic Air Command to publish a book commercially through private and exclusive contract. This letter says in part:

> "As to the matter of private writings by Department personnel, it has been the established policy of the Department for years that key civilian and military officials may not as private individuals author for exclusive publication, articles or books dealing with national defense plans, policies or programs except for publication in official or unofficial Service Journals and in recognized scientific or professional magazines, journals, encyclopedias and the like.
>
> "Among the reasons for this policy are: *the need to insure the right of the general public to have access to official information through the normally accepted public information media sources and without the payment of substantial tolls for it; . . .* " (emphasis added).

Leading journalists have urged that their trusteeship of the people's right to know requires the right of access: "Free reporting is as much the product of access to news as of the absence of restraint in transmitting it." [91]

A Pulitzer Prize-winning journalist who is also a lawyer, speaking representatively for the journalism profession, said: "A free press must also embody a free access to the operations of governmental agencies and the activities of Government officials. There can be no real right to criticize unless there is a freedom of access to facts upon which to base an informed and

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[90] "Availability of Information from Federal Departments and Agencies", Part 3, *Hearings Before Subcom., House Comm. Govt. Opera., 84th Cong.*, 2nd Sess., May 8 and 9, 1956, p. 441. See also CROSS, THE PEOPLE'S RIGHT TO KNOW 131-32 (1953).

[91] Editorial, Washington Post, March 27, 1961, p. A14, col. 2.

intelligent criticism." [92]

On the facts of the instant case, Petitioner's constitutionally-protected Freedom of Press includes the right of access to Respondent Government official's publicly-released speeches delivered while he was on official duty on subjects connected with and directly related to his official duty. Therefore, Respondent's receiving, and the United States Government's issuing, a copyright registration over such speeches is in contravention of Petitioner publisher's right of Freedom of Press under the First Amendment to the Constitution.

III. Decision of court below abridges Freedom of Press and hobbles the people's *right to know.*

If Respondent is permitted valid copyright monopoly over his speeches on subjects connected with and directly related to his official responsibilities, he can deny to anyone, including the daily press and news periodicals, the right to quote these speeches. That he granted such limited right is a matter of grace on his part, not a question of right on the part of the press. In the instant case Respondent actually exercised his copyright power to shut off all press rights or turn them on at will. When first he copyrighted the speeches, he allowed only "contemporaneous press use" (R.17). Later he decided to change this permission to read "for newspapers or news periodicals (R.18).

Today Respondent favors the daily press; tomorrow he may turn on it. A free press cannot exist on the basis of juggled and discriminatory permissions granted or withheld solely by the grace of a Government official.

By sanctioning Respondent's right to conceal or selectively to release officially published Government materials, the court below hobbles the public's *right to know.* The Constitutional guarantee of a free press is lost if its effectiveness depends on the sufferance of those from whom the Constitution guaranteed

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[92] Clark R. Mollenhoff, for Sigma Delta Chi, journalistic society, "Freedom of Information and Secrecy in Government", *Hearings on S. 921, 85th Cong., 2nd Sess., Part II, April 16, 1958, Sen. Jud. Comm., Subcom. on Constitutional Rights,* p. 616.

the press freedom.

The decision of the court below, if allowed to stand, permits a Government official to

—dictate or manipulate the press' use of an officially-issued press release of a speech on official business made during official duty,

—make it available only to those who speak favorably of him and interpret it in an "approved" manner, and

—limit its use to political, social, religious, commercial or other favorites.

In other words, the decision below means that a Government official can deny, limit or restrict the press' and the public's access to officially released and sanctioned Government press releases except on his own terms. This result conflicts with the constitutional and statutory bases of the copyright act as described by the Register of Copyrights: "Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail." [93]

This Court has warned against the dangers in limiting Government information to what a Government official pleases to make known. In a case arising out of the Teapot Dome scandals of the 1920's the Court said: "Experience has taught us that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete . . ." [94]

This year the Court issued another warning that is pertinent to the instant case. The "spike mike" decision, said Mr. Justice Stewart, "is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely,

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[93] *Report of Register of Copyrights, supra*, at p. 6.

[94] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U.S. 616, 635." [95]

That Respondent is, as Petitioner readily concedes, a person of good will is irrelevant. As Mr. Justice Clark said for the Court in the last term: "It is no consolation to an individual denied . . . the equal protection of the laws that it was done in good faith." [96] Mr. Justice Brandeis once said: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." [97]

An experienced journalist-lawyer told the Senate that: ". . . we must be guided by this principle: 'never trust a good man to make secret decisions for you, if it would frighten you to lodge the same power in an evil man or a man who is on the other side of the political fence'." [98]

Here we have far more than "harmless, empty shadows".[99] A "pragmatic assessment" [100] of the present situation in the Petition for a Writ of Certiorari in this case discloses what elsewhere, in a different context, Mr. Justice Brennan called "dismal pictures of official lawlessness",[101] through systematized evasion of the statutory prohibitions against copyrighting "Government publications".[102] Respondent seeks to justify his action because others may allegedly have done likewise. Long-repeated violation of the Constitution does not invoke legitimacy upon the violation.[103]

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[95] Silverman v. United States, 365 U.S. 505, 512 (1961).

[96] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[97] Olmstead v. United States, 277 U.S. 438, 479 (1929), dissenting.

[98] Mollenhoff, Senate Judiciary Committee, Subcommittee on Constitutional Rights, "Freedom of Information and Secrecy in Government", *Hearings on S. 921*, 85th Cong., 2nd Sess., Part II, April 16, 1958, p. 615.

[99] Poe v. Ullman, 367 U.S. 497, 508 (1961).

[100] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

[101] Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 778 (1961).

[102] See Petition in No. 649, Oct. Term, 1960, pp. 18-22 and Appendices E-K (inc.).

In the exercise of its judicial responsibilities, this Court has refused to shut its eyes to "the plainest facts of our national life".[104] Therefore, it is important to realize that inconspicuous suppression of Government publications can effectively be achieved through copyright. The greater portion of all copyrighted material is not accessible to the public at large. For example, less than half of all works deposited for copyright registration were transferred to the Library of Congress [105] and not all that is so transferred is added to the Library's permanent collections.[106] Only 36% of all books and pamphlets received by the Copyright Office were wanted by that Library, most of the rest being returned or destroyed.[107] Thus, the preponderant portion of copyrighted material never appears in the official card catalogs of the Library of Congress or in the catalog cards it furnishes to the nation's libraries. More specifically, Respondent's copyrighting of his 23 speeches did not result in any single one of them being listed in the public card catalog of the Library of Congress. For practical purposes therefore, the copyrighting of Admiral Rickover's speeches is actual suppression of them since the public at large has no means of becoming aware of them or of obtaining access to them.

The United States Government is party to the violation of Petitioner's constitutionally-protected Freedom of Press in two respects:[108]

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[104] See, e.g., Brown v. Board of Education, 349 U.S. 294 (1954); Cooper v. Aaron, 358 U.S. 1 (1958). As to breaking up a "long habit" of illegality, see United States v. E. I. Du Pont de Nemours, 366 U.S. 316 (1961).

[105] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

[105] *Report of Register of Copyrights, supra* at 21; Dunne, *Deposit of Copyrighted Works*, in COPYRIGHT LAW REVISION, Studies Prepared [by the Copyright Office] for the *Subcom. on Patents, Trademarks, and Copyrights, Sen. Jud. Com.*, Pursuant to Sen. Res. 240, 86th Cong., 2nd Sess. (1960), Study No. 20, pp. 27-39.

[106] Fisher, *The Copyright Office and the Examinations of Claims to Copyright*, 1953 COPYRIGHT PROBLEMS ANALYZED 12.

[107] See 17 U.S.C. 214.

[108] Petition makes no claim that the applicable statutes are unconstitutional when properly interpreted.

(1) its specific refusal,[109] as Respondent's employer, to prevent him from illegally and unconstitutionally copyrighting "Government publications",[110] has made the Government "a joint participant in the challenged activity";[111] and

(2) as administrator of the Copyright Office the Government issued a copyright registration on a "Government publication" contrary to statute[112] the Constitution,[113] and its own established and published policy.[114] In so doing, the Copyright Office improperly failed to exercise its authority to refuse registration to deposited articles which are not copyrightable.[115]

By actior of Respondent and the United States Government, the Petitioner has been deprived of its rights of Freedom of Press guaranteed to it by the First Amendment to the Constitution.

IV. The Constitution is a living document. Freedom of Press includes *freedom of access* to publicly-released government materials.

[109] R.27, 111.

[110] For a different affirmative action taken in another similar case, see letter from Asst. Secretary of Defense Snyder, *supra*, p. 52. For general statement to same effect, see House Com. on Govt. Oper., "Availability of Information from Federal Departments and Agencies," 24th Report, 86th Cong., 2nd Sess., H. Rep. No. 2084 (July 2, 1960), at p. 62.

[111] Burton v. Wilmington Parking Authority, *supra* at 725.

[112] 17 U.S.C. 8, 11.

[113] Petitioner respectfully calls to the Court's attention that the Copyright Office was not advised that the items submitted by Respondent for registration had in fact been previously issued and distributed as official Government press releases. Respondent did not disclose this fact and instead submitted specially prepared copies for this purpose. See ¶3(e), Statement of Facts, *supra*, p. 4. *Cf*: Regulations of the Copyright Office, 37 C.F.R. 201.3 (b) (3).

[114] The Register of Copyrights reported the following policy to the Congress: "Any work produced by a Government employee within the scope of his employment is not copyrightable, even though issued by a private publisher", *Report of Register of Copyrights*, *supra*, at p. 131.

[115] *Id.* at 75 ("The Register of Copyrights has for many years exercised the authority to refuse registration when he finds that the article deposited is not copyrightable . . .").

The Constitution is a livi g and sensitive instrument which adjusts to the major needs of the times:

"The Constitution of the United States . . . was made for an undefined and expanding future.

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." [116]

With reference to the meaning of words in constitutional context, Mr. Justice Holmes said:

"[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begettors . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [117]

During the last term the Court cited with approval another comment by Mr. Justice Holmes that is relevant:

"But as Mr. Justice Holmes once said: 'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.' *Compers v. United States*, 233 U.S. 604, 610." [118]

The sensitivity of the Constitution to "the new circumstances and situations" constantly facing the American people, its "adaptability", [119] is especially true of the great liberties protect-

[116] Hurtado v. California, 110 U.S. 516, 531, 530 (1884).

[117] Missouri v. Holland, 252 U.S. 416, 433 (1922).

[118] Konigsberg v. State Bar of California, 366 U.S. 36, 49-50, note 10 (1961).

ed by the First Amendment.

As Mr. Justice Frankfurter said: "Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency . . . Like currency words sometimes appreciate or depreciate in value." [120]

Words, as has been said in this Court, can "import a policy that goes beyond them". [121] In constitutional interpretation it is necessary to go "far beyond the meaning of the phrase in isolation" to its "guiding history". [122]

The purpose of Constitutional provisions is the controlling feature in their application according to this Court. Mr. Justice McKenna said for the Court:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.* This is peculiarly true of constitutions . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power . . . *Rights declared in words might be lost in reality.* And this has been recognized. The meaning and vitality of the Constitution has been developed against narrow and restrictive construction." [123]

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[119] Appalachian Coals Inc. v. United States, 288 U.S. 344, 360 (1933), per Hughes, Ch. J.

[120] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 537-38 (1947).

[121] Holmes, J., Olmstead v. United States, *supra* at 469, dissenting.

[122] Chapman v. United States, 365 U.S. 610, 619 (1961), per Frankfurter, J., concurring. *Cf*: "Reasoning which in one age would make no impression whatsoever, in the next age is received with enthusiastic applause", I LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE, vii (1865).

[123] Weems v. United States, 217 U.S. 349, 373 (1910) (emphasis add-

This Court has long been responsive to the special need for guarding First Amendment rights "with a jealous eye".[124] A liberal interpretation of such rights has been called by the Court "the only conclusion supported by history":

> "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." [125]

First Amendment rights have been persistently protected by this Court from erosion by indirection as well as by direct act.[126] "Sophisticated as well as simple minded" evasions of Constitutional rights have been condemned.[127] This Court has declared that "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." [128] The substance, "the thing", in Freedom of Press, is *freedom of access.*

The extraordinary genius of the Bill of Rights is its adaptability to the problems of each successive generation of Americans. The present generation's special and urgent problem is the

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ed). *Cf*: Mr. Justice Harlan, dissenting, Poe v. Ullman, 367 U.S. 497, 544 (1961).

[124] AFL v. Swing, 312 U.S. 321, 325 (1941).

[125] Bridges v. California, 314 U.S. 252, 263, 265 (1941). See also Olmstead v. United States, *supra* at 471, 476.

[126] Guinn v. United States, 238 U.S. 347, 361 (1915); Grosjean v. Amer. Press Co., 297 U.S. 233, 250 (1936); Speiser v. Randall, 357 U.S. 513, 518 (1958). See also United States ex rel Milwaukee Publication Co. v. Burleson, 255 U.S. 407, 430-31 (1931) (Brandeis, J., dissenting); United States v. Rumely, 345 U.S. 41, 58 (1953) (Douglas, J., concurring).

[127] See Mr. Justice Frankfurter's comment, Lane v. Wilson, 307 U.S. 268, 275 (1939). *Cf*: Louisiana ex rel Gremelion v. NAACP, 366 U.S. 293 (1961).

[128] Cummings v. Missouri, 4 Wall. 277, 325 (1866).

protection and assurance of the American people's right of access to official Government documents and publications. The history of the struggle for Freedom of Press bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it. In the context of mid-20th century America and the present world situation, *Freedom of Press must embody free access to facts concerning the Government's operation (at the very least where no questions of security or executive privilege prevail) and free access to all officially-released Government materials prepared by Government officials in the course of their official duties.* The very nature of First Amendment rights calls for their expansion to meet new and undecided issues. Such is this case.

PUBLIC DOMAIN ARGUMENT — Reply to Respondent's Main Brief in No. 55 [129]

Respondent (as Cross-Petitioner in No. 55) seeks a reversal of the decision below insofar as it rules that he forfeited the right to copyright the first 22 speeches because they were widely distributed and published without a copyright notice, dedicating them to the public domain. Respondent seems to admit that there was publication but claims it was not "of such wide and general nature" as to constitute general publication which forfeits copyright eligibility. He also claims that since the material comprised public speeches, not a book, the widespread distribution of physical copies should not be regarded as a general publication (Part II-D). It is, of course, unnecessary for this Court to reach this issue at all if the Petitioner in No. 36 prevails on either the statutory or constitutional arguments heretofore presented.

The Copyright Law provides that "No copyright shall subsist in the original text of any work which is in the public domain",

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[129] By agreement between the parties, filed with Clerk, affirmative briefs were exchanged in typewritten form prior to submission of the printed briefs, in order that the main briefs might include each party's affirmative statement and the reply to the other party's affirmative statement.

17 U.S.C. 8. To achieve copyright, a notice must appear on each copy of each work prior to or at the time of publication, 17 U.S.C. 10.[130] It is undisputed that Respondent failed to place such a copyright notice on the first 22 speeches prior to their distribution.[131]

There is no directly applicable statutory definition of "publication". The question here is whether the admitted distribution which took place in this case constituted a general or a limited publication. The court below ruled as follows:

> "The agreed facts . . . show a wide distribution not only to the press but also to people generally who desired copies through interest in the subjects of the addresses. The handling of the addresses prior to December 1, 1958, when copyrighting was first attempted, indicated a studied effort not only to secure publicity for the contents of the addresses through channels of information, but to go beyond customary sources of press or broadcasting in distributing the addresses to any interested individual . . . The agreed statement of facts in the case under consideration shows no effort to limit distribution of the speeches delivered prior to December 1, 1958, but rather a willingness to make them available to all who might be interested. Certainly when all of Admiral Rickover's acts of distribution are considered together . . . it is difficult to avoid the conclusion that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain. There is no effort shown to protect that author's private right in any way, no limitation upon those who might obtain copies. *That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies*, 'All claims to copyright

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[130] *Cf*: De Jonge and Co. v. Breuker and Kessler Co., 235 U.S. 33, 36 (1914); Mifflin v. Dutton, 190 U.S. 265 (1903). See decision of Court below, 284 F. 2d. at 269 (R.57

[131] But see 17 U.S.C. 26 which defines "publication" in terms of copyright duration. The Court below regarded this as "some indication of Congressional thinking on the subject", 284 F. 2d at 269 (R.57).

waived'," 284 F. 2d at 270-271 (R.58-60) (emphasis supplied).

After stating that "distribution was not limited in any way to a particular group" and that there was no limitation on the use of the speeches, the Court below concluded: "It is the complete absence of limitation on the use of the printed distributions by anyone at any time which destroyed the common law rights of the author", 284 F. 2d at 271 (R.61).

Petitioner respectfully submits that the decision of the court below on this issue of publication and dedication to the public domain is correct, both as to the rule of law adopted and as to its application to the undisputed facts of the instant case.

I. The issue: Distribution of copies to the public.

Contrary to Respondent's efforts in Parts II D and E of his Main Brief to make it appear otherwise, this case does not involve any question whether mere oral delivery of a lecture, as such,[132] without the accompanying widespread distribution of physical copies of the speeches,[133] as press releases,[134] constitutes publication. The sole issue in No. 55 is whether the facts in this case fall within the law as stated in the Copyright Office's Regulation that "If publication occurs by distribution of copies . . .. without the statutory notice . . .. the right to secure copyright is lost . . .", 37 C.F.R. 202(a)(2).

If Respondent prevails in his contention that his speeches were not published, then the thrust of Petitioner's constitutional argu-

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[132] Wholly irrelevant consequently are the cited cases dealing with oral delivery, Nutt v. National Institute, 31 F. 2d 236 (2d Cir. 1929), or performance rights, Ferris v. Frohman, 223 U.S. 424 (1912).

[133] *Cf*: COPINGER AND SKONE JONES, LAW OF COPYRIGHT 30 (1958); Selvin, *Should Performance Dedicate*, 42 CAL. L. REV. 40, 46 (1954); Schulman, *Author's Rights*, 7 COPYRIGHT PROBLEMS ANALYZED 19, 24 (1951).

[134] Respondent seeks to make much of the fact that the press releases contained language such as "Please Note Date" and "Hold for Release Until Delivery . . ." It is noteworthy that Richard Wagner's *Parsifal* was held to have been published even though the score carried a legend forbidding performance, Wagner v. Canfried, 125 Fed. 798 (C.C.S.D., N.Y., 1903).

ment becomes even more pointed because the owner of unpublished material has the common law right of complete and utter censorship over such materials through a perpetual monopoly over them.[135]

II. The facts: No limitation of any character on persons to whom the speeches were distributable or on use that could be made of speeches.

The agreed statement of facts in this case shows (*supra*, Statement of Facts, p. 5) that

1) Each of the first 22 speeches, except Numbers 7 and 12, was officially issued as a press release of the United States Department of Defense or the U.S. Atomic Energy Commission.
2) None of them bore a copyright notice at the time of issuance and distribution.
3) None of them, at the time of issuance and distribution, bore any written or oral restriction or limitation whatsoever upon their use or publication, in whole or in part, or upon their distribution or availability.
4) Each of these 22 speeches, except for Numbers 7 and 12, were—in addition to being officially and publicly issued as Government press releases—distributed by the Admiral himself in the following manner:

   (a) approximately 50 copies to the sponsor of each speech "to be made available to the press and others . . .",

   (b) mailed "to individuals who had requested copies or who [sic] Admiral Rickover believed would be interested in the subject", and

   (c) at the National Press Club in Washington, D. C., for the use of any and all who cared to pick up a copy there,

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[135] Copyright Law, 17 U.S.C. 2; Wilson, *The Scholar and the Copyright Law*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 10, 105-6, 113, 117 (1959); Roberts, *Publication in the Law of Copyright*, *id.*, No. 9 at 110 (1958); Pickard, *Common-Law Rights Before Publication*, *id.*, No. 3, at 209 (1940); Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. SOC. 642, 646 (1955).

although none of these speeches was delivered at that location.

III. General publication means distribution unrestricted either as to person or use.

The leading case defining general and limited publication is *Werckmeister*, wherein suit was brought to restrain infringement of copyright in a painting which had been exhibited at the Royal Academy of Arts in London. The Academy's rules included the provision that "No permission to copy works during the term of the exhibition shall on any account be granted." Judge Townsend, in the Second Circuit, held that the exhibition was a limited publication because of the Exhibit's rule against copies:

> "A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public . . . [Because of the rule against copying] such exhibition did not amount to a general publication." [136]

The court also said that "the unrestricted offer of even a single copy to the public implies the surrender of the common-law right" (p. 325). It stated the test of general publication as

> "whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed" (325).

When the *Werckmeister Case* reached this Court, the Court said that Judge Townsend's opinion "leaves little to be added to the discussion." [137] This Court ruled:

> " . . . There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place . . . [W]e think that the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with

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[136] Werckmeister v. American Lithographic Co., 134 Fed. 321, 324, 330 (2d Cir. 1904).

[137] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907).

the acts shown, not to permit such an inspection of his picture as would throw its use open to the public" (300).

In *Werckmeister*, said this Court, the publication was "under conditions which exclude the presumption that it was intended to be dedicated to the public" (299). This Court stated the basic rule of law as follows:

> "It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property." [138]

Another leading case which supports Petitioner's contention is *White v. Kimmel*, 193 F. 2d 744 (9th Cir. 1952), *reh. denied* 1952, *cert. denied* 343 U.S. 957 (1952). There the basic rule of law was thus stated:

> ". . . a limited publication which communicates the contents of a manuscript to a definitely selected group for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication' which does not result in the loss of the author's common-law right to his manuscript; *but that circulation must be restricted both as to person and purpose, or it cannot be called a private or limited publication*" (at 756-747, emphasis supplied).

This oft-cited case [139] presented circumstances which to a startling degree are similar to those of the instant case. There the claim was that the author had dedicated his manuscript to the public domain by "reproducing and distributing copies himself and permitting others to do so without limitation as to use or right to republish and without notice of claim of copyright", and the Court so found. In the *White Case*, the author's secre-

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[138] The Court adopted as its own the above-quoted statement from SLATER ON THE LAW OF COPYRIGHTS AND TRADEMARKS 92.

[139] See, for example, American Visuals Corp. v. Holland, 239 F. 2d 740, 744 (2d Cir. 1956); Continental Casualty Co. v. Beardsley, 253 F. 2d 702, 706-7 (2d Cir. 1958), *cert. denied* 358 U.S. 816 (1958); Hirshon v. United Artists Corp., 243 F. 2d 640, 644 (D.C. Cir. 1957); McIntyre v. Double-A Music Corp., 166 F. Supp. 681, 682 (S.D. Calif. 1958).

tary ran off some 60 to 70 mimeographed copies and, at his request, mailed 18 to 20 to a list of names supplied by him, with a transmittal note that it was sent because "of your interest". With the author's permission, other copies were distributed to interested persons. No limitation was placed on the persons to whom it could be distributed. A later run of 40 to 50 copies was distributed by the author "to friends and in part to strangers who wrote him requesting a copy."

The Court in *White* commented on the facts of that case:

> "Nobody seeking the mimeographed manuscript appears to have been asked for any sort of credentials. In a word, we are unable to see in this picture any definitely selected individuals or any limited, ascertainable group or class to whom the communication was restricted . . . *His only apparent purpose was to enable any person interested to obtain a copy of the manuscript* . . . Such a purpose, we think, is too broadly general and indefinite to satisfy the test of a limited publication" (at 747, emphasis supplied).

This Court in *Werckmeister* laid down the rule that the necessary feature of a limited publication is the restriction placed upon the general public in its use of the material involved. *White* outlined the contours of the required restriction, and required that it must apply *both* to persons and purpose (or use). Applying the rules of both these leading cases to the instant case, it is clear that the actual distribution of physical copies of the Admiral's speeches constituted a general publication. The unrestricted distribution of such press releases was such "as to justify the belief that it took place with the intention of rendering such work common property" (*Werckmeister*).[140] The wholly

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[140] An author's intention for a limited publication is insufficient to achieve such if in fact no restriction on use is evidenced. National Comic Publications v. Fawcett Publications, 191 F. 2d 594, 598 (2d Cir. 1951), opin. clarified 198 F. 2d 927 (1952). See also White v. Kimmel, *supra*, at 747; 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 691 (1938); Nimmer, *Copyright Publication*, 56 COL. L. REV. 184, 201 (1956); Schlattman, *The Doctrine of Limited Publication*, ASCAP, COPYRIGHT LAW SYMPOSIUM No. 5, at 66 (1954).

unlimited authorization for use of the copies of the speech was "such surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom it may be committed". The unrestricted offer of a substantial number of copies entailed "surrender of the common law right" of the author. The undisputed facts make it crystal-clear that (1) no limitations of any kind whatsoever were placed on the persons obtaining copies or on the use they could make thereof, and (2) the Admiral acted in such a manner as to make copies of these speeches "open to the public".

White required that the circulation must be restricted as to *both* person and purpose before it is a limited publication. If it be unrestricted *either* as to persons,[141] or as to purpose or use,[142] it is a general publication. In the instant case, copies of the Admiral's speeches were openly available to anyone and everyone who was interested and not merely to a limited class of persons; there was no restriction as to "the persons to whom they could go."[143] There was no limitation of the use of such speeches for any "special purpose."[144] The press release copies were freely distributed "without reservation of rights"[145] and under circumstances which clearly made them freely available to "all comers".[146] A comment made on the *White Case* is precisely applicable to the instant case: "No one seeking the

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[141] See Ladd v. Oxnard, 75 Fed. 705, 729-730 (D. Mass. 1896); Nimmer, *op. cit. supra*, at 200-201.

[142] See Schlattman, *op. cit. supra*, at 53.

[143] Walden, *op. cit. supra*, at 653.

[144] See Wagner v. Canfried, *supra*, at 800-801.

[145] *Cf*: Patterson v. Century Productions, 93 F. 2d 489, 492 (2d Cir. 1937), *cert. denied* 303 U.S. 655 (1938); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 131 (1944). The *U.S. Navy Public Information Manual*, Article 2301(1), states: "More than fifty million newspapers are sold in the United States every day. It is believed that each paper is read by at least two people. Thus we can say that almost all Americans read the daily papers. As a medium, therefore, newspapers are the single most effective way of reaching the largest possible audience."

[146] See Nimmer, *op. cit. supra*, at 187. *Cf*: Case Comment, 45 IOWA L. REV. 896, 901 (1960).

mimeographed manuscript seems to have been asked for any sort of credentials."[147] The completely unrestricted accessibility[148] and usability of the copies of the Respondent's speeches, lacking any copyright notice, makes the distribution a general and divestitive[149] publication which dedicates them to the public domain.[150]

Another, and unique, feature of the present case is that the Admiral himself distributed copies of the first 22 speeches as "handouts",[151] for unsupervised distribution, at the National Press Club in Washington, D. C., although this was not the locale for the delivery of any of these speeches. This Club is frequented by a wide variety of persons and membership is not limited to the press.[152] Moreover, the Club is constantly used for public and private affairs of various groups unrelated to the press. In each instance, the press releases on the "handout" rack are openly available for any who desires to take them. Distribution of the Respondent's speeches at the Club was an open invitation to anyone, not merely members of the press covering his speech or the audience listening to it, to take a copy, without the slightest indication of limitation as to persons or purpose.

By virtue of the National Press Club's policy above-described, its dining and meeting facilities are not unlike those of a hotel.

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[147] Walden, *op. cit. supra*, at 653.

[148] Ball, *op. cit. supra*, at 140, 414.

[149] Recent Cases, 73 Harv. L. Rev. 1219, 1222 (1960). In pressing the distinction between "investitive" and "divestitive" publication, Respondent's principal citation (Part II-A) is Kaplan and Brown, Cases on Copyright 52-64 (1960). Three main cases appear in the indicated pages, two of which (White v. Kimmel, and American Visuals Corp. v. Holland) are major precedents for Petitioner, as cited herein, and the third of which held that divestitive publication had taken place.

[150] See Schlattman, *op. cit. supra*, at 65-66.

[151] See Bruce Catton, *Handouts*, in Dateline: Washington, The Story of National Affairs Journalism in the Life and Times of the National Press Club 167 (1949).

[152] Associate members need only be actual or potential sources of news, and may total 90% of the number of active (or working press) members. National Press Club, *Constitution*, §4.

In *D'Ole v. Kansas City Star Company*, the court had to decide the status of materials which had been freely left available at a public place. The court held that such fact constituted a general publication:

> ". . . it is safe to say that the appearance of a pamphlet, after its delivery to Plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly is a 'rendering it accessible to public scrutiny' and was likewise 'a communicating it to the public by distribution of copies.'" [153]

A similar situation arose in *American Visuals Corporation v. Holland*,[154] where an author was endeavoring to find a publisher among insurance companies. On one occasion, 100 copies of his manuscript were placed on a hotel table, along with other publications for "unsupervised distribution", during a convention of insurance executives. No limitation was placed on the persons who might obtain copies by picking them up from the table or otherwise. The Court held that such distribution resulted in a general distribution of the manuscript. After citing *White* and its rule of limitation as to persons and purpose, the Second Circuit held:

> "But the plaintiff placed no limitation on who could inspect, retain or receive, through any of the original distribution, a copy of his work . . . We conclude, therefore that while the 'purpose' of the distribution was limited [to obtain a publisher], the 'persons' to whom it might be given was unlimited" (at 744).[155]

A brief summary of the present law has just recently been stated officially by The Register of Copyrights, thus: "Under our present law, 'publication' means making copies of a work available to the public."[156]

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[153] 94 Fed. 840, 842 (Cir. Ct. W.D. Mo. 1899), cited with approval in American Visuals Corp. v. Holland, *supra*, at 745.

[154] 239 F. 2d 740 (2d Cir. 1956).

[155] *Cf*: "Giving away to patrons or passers-by, lending copies to anyone who applies, appears to be a public distribution." LADAS, *op. cit. supra*, at 691. See BALL, *op. cit. supra*, at 140.

[156] *Report of Register of Copyrights*, p. 31.

The Petitioner respectfully submits that the Court below correctly held that Respondent's distribution of his first 22 speeches constituted a general publication which dedicated them to the public domain and therefore made them uncopyrightable.

CONCLUSION

For the reasons stated, Petitioner in No. 36 respectfully submits that the decision and judgment of the Court below should be

1) *reversed* in No. 36, insofar as it held that the copies of the speeches in question were not "Government publications" and were therefore susceptible of valid copyright, and

2) *affirmed* in No. 55, if it be necessary to reach this issue at all in view of the holding on the previous point, insofar as the Court below held that the distribution of the first 22 speeches was a general publication which dedicated them to the public domain.

Respectfully submitted.

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